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In the

Supreme Court of the United States

October Term, 1977

No. 77- 77-1522

Ramsey Alexander, et al.,
Petitioners,
v.

Aero Lodge No. 735, International Association of Machinists and Aero Space Workers, AFL-CIO, and Avco Corporation, Aerospace Structures Division.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
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NO. 77 -

RAMSEY ALEXANDER, et al.,

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v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, AFL-CIO, and AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 1, 1977.

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit, reported at 565 F.2d 1364, is reprinted *infra* at p. 78a. The order of the court denying the petition for rehearing *en banc* of the petitioner herein has not been reported, but is reprinted at p. 120a. The memorandum opinion of December 18, 1973, of the United States District Court for the Middle District of Tennessee is reported at 7 E.P.D. ¶19117 and reprinted at p. 1a. The implementing order of August 20, 1974, of the district court is reported at 380 F.Supp. 1282 and reprinted at p. 67a. The further order of February 11, 1975, of the district court, amending its previous order, is reported as Addendum to the opinion of the United States Court of Appeals for the Sixth Circuit, at 565 F.2d 1385-88, and is reprinted at p. 113a.[1/]

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on November 1, 1977. The petitioners' petition for rehearing and rehearing *en banc* was denied on January 24, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1/] Orders of June 3 and June 20, 1975 of the district court, relating to back pay and attorneys' fees, are not involved in the petition for certiorari and are therefore not reprinted.

Question Presented

Did the court of appeals err in holding that Title VII of the 1964 Civil Rights Act and 42 U.S.C. §1981 permits an employer to provide a special training program for an all-white group of employees, which enables them to bump black employees from their jobs, even though that program was adopted for the purpose, and had the effect, of discriminating on the basis of race?

Statutory Provisions Involved

Section 703 of the Civil Rights Act of 1964, 78 Stat. 241, 255-57, 42 U.S.C. §2000e-2 (1970), read in pertinent part as follows: [2]

> SEC. 703. (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any

> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * *
>
> (c) It shall be an unlawful employment practice for a labor organization --
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
>
> (d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate

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[2] Minor amendments to §§703(a)(2) and (c)(2) made by §8 of the Equal Employment Opportunity Act of 1972, P.L.92-261, would have had no bearing on any of the issues in this case.

> against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
>
> * * *
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin ...
>
> * * *

Statement of the Case

In 1966 and 1968, respectively, petitioners Ramsey Alexander and Robert F. Newman brought actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C.§§2000e et seq., and section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981, against both respondents on behalf of a class of black employees and applicants for employment, alleging a wide range of racially discriminatory practices. Following a consolidated trial between June and August of 1972, the district court found that both respondents

had discriminated against black employees in a number of respects, both before and after July 2, 1965, the effective date of Title VII.

This petition for certiorari seeks review only of the reversal by the court of appeals of the district court's finding of unlawful discrimination with respect to the Globe-Wernicke incident, described below, in 1971-72. The long and dismal tale of the other discriminatory practices of the respondents will be mentioned only to the extent that portions may be relevant to that incident.

Collective bargaining contracts between the respondent company and union dictate the priorities among employees with respect to promotions, layoffs and recalls. These contracts "gave an absolute preference to employees with prior, satisfactory service in the particular occupation" (565 F.2d at 1376, 95a), a preference referred to by the parties and the courts below as "job equity." [3/] Because of past favoritism for whites in awarding the better jobs, this system disproportionately excluded blacks from opportunities to be transferred into such jobs,

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[3/] Among those with job equity, length of service with the company was decisive.

even though they were in fact capable of doing work. The disadvantage to blacks was compounded by preferential treatment accorded whites in being given training and experience on the more attractive jobs. Thus the rules governing priority among employees with respect to promotions, lay-offs and recalls almost always worked strongly to the disadvantage of black employees.

In 1971, however, a situation developed in which the opposite was about to occur. The Globe-Wernicke Division of the company, which manufactured furniture, was to be phased out in late 1971, and its employees terminated. 73 of these employees had seniority dating from 1950 to 1960. All 73 were white. Meanwhile, in the aircraft operations of the same employer there was an occupation known as "assembler-bench and jig." The number of employees assigned to this occupation fluctuated widely with the commencement and completion of successive contracts. Most of the blacks employed by Avco were in this occupation, and most had fairly short seniority. But none of the Globe-Wernicke employees had ever worked as assemblers-bench and jig, and they therefore had no right to bump more junior employees in that occupation. Thus the job equity

rules which in the past had so successfully worked to the detriment of frustrated black employees were about to afford them a small measure of protection.

To prevent this from occurring the respondent employer, under pressure from the respondent union, initiated a special program to train these 73 senior Globe-Wernicke Division employees in the assembler-bench and jig skills and then hired them into that occupation. Nothing similar had ever been done by the respondents when it would have benefited black employees. The respondents knew that because of periodic wide fluctuations in employment in airplane manufacturing, there would soon be layoffs among assembler-bench and jig workers. They also knew that many blacks in that occupation had short seniority, and that they would bear the brunt of the expected layoffs if they were deprived of the absolute priority they had had over the Glove-Wernicke employees by virtue of the latter not having worked in the occupation. Within a few months precisely that occurred; because of the new rights conferred on the 73 whites from Globe-Wernicke, at least 52 blacks, almost a third of the black bench and jig employees were laid off.[4/] Of the 73 Globe-Wernicke workers who benefited from the special training program, 100% were white; of the 73 bench and jig employees who were displaced and lost their jobs as result of that program, 80% were black. Thus adopting the special program was tantamount to a decision to fire a group of black employees and replace them with a group of whites.

The district court, relying on this evidence, its finding that respondents knew the program would result in the displacement of blacks by whites,[5/] and the company's long history

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[4/] These figures are derived from the district court's findings, 7 E.P.D. at p.6688, 34a. Slightly different numbers were set forth in the court of appeals opinion, 565 F.2d at 1381, n.10, 103a, n.10, but the grossly disparate racial impact of the incident was not questioned.

[5/] 7 E.P.D. at pp.6687-88. 34a. This finding was upheld by the court of appeals, 565 F.2d at 1380, 103a. One finding of fact not directly relevant was not upheld; the district court had found that the rehiring of the Globe-Wernicke employees into assembler-bench and jig occupation violated the collective bargaining contract, while the court of appeals held that the procedure was neither compelled nor forbidden by the contract. (565 F.2d at 1380; 103a.)

history of discrimination held, that the decision to provide special training to the 73 whites was intentional discrimination. 7 E.P.D. at p.6688, 35a. The majority of the court of appeals, while not questioning the district court's finding of intent, held that the special training program was immune from attack under Title VII because the white beneficiaries were senior employees of the company. Judge Edwards dissented on this issue and voted to affirm on the ground that that finding of discriminatory intent was not clearly erroneous.[6/]

[6/] No matter how desirable a general policy of training laid-off employees for future job opportunities in their former employer's plant might be, if, as the District Judge appears to have held here, it is done for the first time in the history of the company in a situation where the company's past employment policy was clearly discriminatory to black employees and the company knows that the new program will have the result of eliminating 52 out of the total 286 black employees in the plant, in my view the Judge was not clearly erroneous in finding the practice to be discriminatory. 565 F.2d at 1388, 119a.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals presents a serious threat to the full implementation of Title VII of the 1964 Civil Rights Act. Although the district court found that the respondents had engaged in intentional discrimination, and the record showed that the disputed training program had a striking disparate racial impact, the Sixth Circuit thought neither fact relevant. It explained:

> Rather, we conceive the real issue to be whether Avco had a duty to refrain from retraining and hiring recently laid off and more senior employees in order to protect the interests of newer employees, who enjoyed less seniority but were more racially balanced in their composition. We are loath to hold that the practice of a company and a union of retraining its older employees so that they could enjoy the benefit of continued employment is discriminatory in nature merely because its implementation tends to adversely affect the racial composition. 565 F.2d at 1381, p. 103a.

Although the court of appeals was aware that racial motive was the basis of the district court decision,[7] it declined to discuss that issue, apparently concluding that racial discrimination was not actionable under Title VII if the white beneficiaries had, in any sense,[8] more seniority than the black victims.

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[7] The court noted "Defendants strenously urge that the district court misconstrued their intent in retraining and rehiring the laid off Globe-Wernicke employees...." 565 F.2d at 1380, p. 102a.

This decision is not merely wrong, but dangerous. Approximately two-thirds of all collective bargaining agreements allow more senior employees to bump less senior workers if the more senior employees are in fact qualified to do the job held by the less senior worker.[9] Because of a pervasive history of racial discrimination, in many industries the most senior employees are overwhelmingly white. Although these collective bargaining agreements generally work to the advantage of whites, the qualification requirement provides some degree of job security for blacks in a period of layoffs. Under the Sixth circuit's decision, however, an employer facing a need to make layoffs in one department could choose to give the whites involved special training to qualify for jobs then held by blacks, and thus enable them to bump the blacks out of their jobs. That decision invites and sanctions a new form of discrimination which, in a time of continued economic uncertainty, threatens the job security of blacks.

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[8] Of course prior to 1971 the whites at Globe-Wernicke had less seniority rights to bench-jig jobs than the blacks then holding those jobs. The whites were "older" in the sense they had worked longer for the company, but that fact by itself conferred no seniority right to a particular job.

[9] Bureau of National Affairs, Basic Patterns in Union Contracts, pp. 66,68 (8th ed. 1975).

The opinion of the court of appeals is clearly inconsistent with the decision of this Court in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). In Franks whites had been the beneficiaries of discrimination in hiring, and were able under the collective bargaining agreement to use their unlawfully acquired status to enjoy a variety of benefits, including protection against layoffs, at the expense of the black victims of that discrimination. The company and union there urged that the black victim had no right to relief under Title VII, since, regardless of the presence of racial malice in the hiring decision, the application of a seniority system to the circumstances produced by that discrimination was immune from scrutiny under Title VII. This Court rejected that contention, holding that regardless of

whether the seniority system involved is bona fide, a black victim must be afforded relief from the effects of the hiring discrimination or "He will perpetually remain subordinate to persons who, but for illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." 424 U.S. at 768. That is precisely the situation in this case except that the critical act of intentional discrimination related, not to hiring, but to special training for whites. Prior to 1971, the whites at Globe-Wernicke were inferior in seniority, insofar as a right to hold a bench and jig job was concerned, to the black bench and jig operators. The disputed training program had the effect of bumping blacks out of their rightful places. Franks makes clear that those blacks are entitled under Title VII to return to those rightful places.

The conferring of special seniority rights on Avco's white employees to the detriment of its black assembler bench and jig workers is not protected by §703(h) of Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) and United Airlines, Inc. v.

Evans, 431 U.S. 553 (1977) do not sanction the perpetuation of past discrimination by means of a seniority system. Those cases merely provide that, if such a system is bona fide, the actionable violation is the original act of discrimination and that a timely charge must be filed as to that act. Such a charge and action were filed with respect to the special Globe-Wernicke training program, and plaintiffs were entitled under Franks, as a remedy for that intentional violation, to relief from its perpetuation through dismissal based on the newly acquired job equity accorded the whites.

The sixth circuit's decision is also in conflict with that of the seventh circuit in a similar situation in Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320-21 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). In that case, after being laid off by the employer, a group of whites elected to waive their recall rights in return for severance pay, thus placing them behind a black steelworker, Mr. Waters, who did not exchange his recall rights for severance pay. When the employer began rehiring, it agreed to

disregard the whites' waiver, and thus hired them ahead of the laid off black. The seventh circuit held that Title VII forbade the employer from gratuitously conferring special seniority benefits on white employees to the detriment of blacks. 502 F.2d at 1321. That is what occurred in the instant case.

Were the court of appeals' decision read as overturning the district court's finding of intentional discrimination, that decision would represent a serious and unwarranted departure from the normal allocation of fact-finding responsibility between the trial and appellate courts. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). The record before the district court was clearly sufficient to support, if not to require, a finding of intentional discrimination, especially since none of the beneficiaries, and almost all the victims, of the disputed program were black, Teamsters v. United States, 431 U.S. 424 (1977), and the program represented an unprecedented departure from past practice. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977). The district court's analysis of that record involved neither disputed evidentiary rulings nor questions of law. Under these circumstances the court of appeals was required to accept the district court's findings unless they were clearly erroneous. Rule 52, Federal Rules of Civil Procedure. The sixth circuit did not hold those findings to be clearly erroneous and, as Judge Edwards observed, could not have done so on the record in this case. We note that another case regarding the fact finding roles of trial and appellate courts in Title VII cases is already pending before this court. Furnco Construction Corp. v. Waters, No. 77-369.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the court of appeals for the sixth circuit.

Respectfully submitted,

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Appendices

DISTRICT COURT MEMORANDUM OPINION OF DECEMBER 18, 1973

United States District Court,
Middle District of Tennessee
Nashville Division
Nos. 5258 and 4335

CAPTION OMITTED

MEMORANDUM

Morton, D. J.: These suits are brought as class actions alleging discriminatory racial practices and policies of the defendants with respect to classification of employees, training, promotions, transfers, working conditions, compensation and terminations pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-15; 42 U.S.C. §§1981 and 1985; 28 U.S.C. §1343(1) and (4); and 29 U.S.C. §§151, et seq. These suits were consolidated by the court pursuant to Rule 42(a), Fed. R. Civ. P. with plaintiffs as representatives of one class under Rule 23, Fed. R.Civ. P. These consolidated suits were heard on their merits beginning June 26, 1972, and ending August 5, 1972.

Civil Action No.4335 was originally filed by Ramsey Alexander setting forth the above allegations, and by order of the court Raymond L.Dennis and Warner McCreary were permitted to intervene as plaintiffs. Civil Action No 5258 was originally filed by Robert F. Newman with similar allegations, and the two cases were consolidated for trial by order of this Court. Alexander is still employed by defendant Avco and is a member of Aero Lodge No. 735. Dennis, McCreary and Newman are former employees of the defendant Avco and are former members of the defendant union, Aero Lodge No. 735.

Robert F. Newman filed this suit on December 30, 1968, as a class action alleging racially discriminatory policies and practices on the part of defendant Avco Corporation and defendant Aero Lodge No. 735 in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. This District Court granted defendants' motions for summary judgment on March 26, 1970. Newman v. Avco Corp-Aerospace Str. Div., Nashville, Tenn, 313 F.Supp. 1069 (M.D. Tenn. 1970). The District Court ruled that plaintiff Newman had made a binding election of remedies by pursuing the collective bargaining agreement to a final conclusion by the arbitrator, and dismissed the class action suit.

This ruling was reversed by the Sixth Circuit Court of Appeals on October 27, 1971, Newman v. Avco Corp-Aerospace St. Div., Nashville, Tenn, 451 F.2d 743 (6th Cir. 1971), the Court ruling that the election of remedies doctrine was not applicable to Title VII actions. The Court further stated:

> "In short, major aspects of this District Court complaint were either not submitted to arbitration or were beyond the arbitraror's power of decision. To such issues plainly neither the doctrine of re judicata nor collateral estoppel can apply." Id. at 748.

The Court noted that "[n]owhere in the labor-management agreement is there any prohibition against race discrimination in hiring, employment, promotion or discharge." Id.

The Court of Appeals concluded that:

> "this case must be reversed and remanded to the District Court to take testimony and enter findings of facts and conclusions of law upon appellant's charges of unfair representation by respondent union, in violation of Title VII, Sec. 703(c)(1) and upon appellate's chages of violations of Title VII, Sec. 703(a)(1) by respondent Avco as set forth above." Id. at 749.

Title VII, Sec. 703(a)(1) provides:

> §2000e-2. Unlawful employment practices -- Employer practices
>
> "(a) It shall be an unlawful employment practice for an employer --

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;" 42 U.S.C. §2000e-2(a)(1).

Title VII, Sec. 703(c)(1) provides:

> "(c) It shall be an unlawful employment practice for a labor organization --
>
> "(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;" 42 U.S.C. §2000e-2(c)(1).

Plaintiff Newman was discharged by defendant Avco on February 1, 1966. On February 2, 1966, plaintiff signed a grievance protesting his discharge and seeking reinstatement. This grievance was filed with Avco by defendant union. Plaintiff Newman amended the grievance five days later on February 7, 1966, to allege that his discharge was racially motivated. After the defendant union, Aero Lodge No. 735, refused to allege racial discrimination in the grievance, plaintiff retained an attorney to argue his racial

discrimination before the arbitrator at the hearing on April 21, 22, 1966. Plaintiff filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") against both defendant Avco Corporation and defendant Aero Lodge No. 735 on May 2, 1966. The arbitrator rendered his decision unfavorable to plaintiff on all grounds on June 28, 1966.

Plaintiff Newman filed this suit in federal court on December 30, 1968, after the EEOC notified him that there was reasonable cause to believe that he had been the subject of unlawful discrimination by Avco Corporation and Aero Lodge No. 735.

Plaintiff Ramsey Alexander signed and forwarded a formal charge of racial discrimination with the EEOC on September 8, 1965. The EEOC determined that there was reasonable cause to believe that Avco Corporation and Aero Lodge No. 735 had engaged in unlawful employment practices within the meaning of §703 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. The EEOC, by letter dated December 13, 1965, and received on or about December 17, 1965, advised plaintiff Alexander that conciliation efforts had failed and that he could institute suit in federal court within thirty days from the receipt of the letter. Plaintiff Alexander filed this suit in federal court on January 13, 1966. Plaintiff Alexander did not attempt to ulitize the grievance procedure. In this regard the court notes that the collective bargaining agreements between Avco and the union at the time, and prior to the time Alexander filed this suit contained no prohibition against racial discrimination by the employer Avco Corporation or by defendant union.

Raymond L. Dennis, who filed a charge with the EEOC against defendants Avco Corporation and Aero Lodge No. 735, alleges in this intervening complaint that he was discharged by Avco for racial reasons on January 26, 1971. Dennis alleges that Aero Lodge No. 735 discriminatorily refused to fully and fairly represent him in challenging his discharge.

Warner McCreary alleges in his intervening complaint that he was discriminatorily suspended for protesting against what he believed was Avco's racially discriminatory firing of co-intervenor Raymond L. Dennis. McCreary alleges that defendant Aero Lodge No. 735 discriminatorily represented McCreary in this matter by refusing to

protest and challenge this alleged racially discriminatory suspension.

On June 1, 1971, Dennis and McCreary filed a motion to intervene as plaintiffs pursuant to Rule 24, Fed. R. Civ. P. This Court, on July 29, 1971, allowed Dennis to intervene to obtain injunctive and individual relief. The court allowed McCreary to intervene solely for injunctive relief. McCreary filed a notice of appeal of the court's order; however, his appeal was subsequently voluntarily dismissed on December 29, 1971.

The court must initially determine whether this suit is properly maintained as a class action, and if so, define the class and determine whether or not the plaintiffs may properly represent the class. The allegations of the Alexander complaint with the EEOC and those of the Newman complaint with the EEOC are practically identical, except that Newman alleges additionally a racially motivated discharge. On appeal in the Newman case, the Sixth Circuit Court of Appeals stated:

> "We conclude that this case must be reversed and remanded to the District Court

> to take testimony and enter findings of fact and conclusions of law upon appellant's charges of unfair representation by respondent union, in violation of Title VII, §703(c)(1) and upon appellant's charges of violation of Title VII, §703(a)(1) by respondent Avco, as set forth above. As to these latter charges, appellant is an appropriate representative of the class described in the complaint and the class action aspect of this suit must likewise be the subject of hearing, findings and conclusions. [Citing cases.]" Newman v. Avco Corp-Aerospace St. Div., Nashville, Tenn., supra, at 749.

The Sixth Circuit Court of Appeals construed plaintiff Newman's judicial complaint as follows:

> "We read appellant's complaint as alleging a long-standing conspiracy to maintain a system of race discrimination participated in by both company and union (the contracting parties which created the arbitration machinery and chose the arbitrator), an element totally lacking in Dewey. . . This totality of circumstances appears to represent a fundamental attack upon the fairness and impartiality of the arbitration proceeding and specifically to represent an allegation of bad faith against defendant union. (See Vaca v. Sipes, 386 U.S. 171 (1967).)" Id., at 747, 748.

Plaintiff Alexander, in his judicial complaint, factually alleges racial discrimination by defendant Avco Corporation in the areas of training, transfers, upgrading opportunities, promotions, wage increases, job classification and reclassification. Alexander charges Aero Lodge No. 735 with acquiescing and cooperating with Avco Corporation in this alleged discrimination, and with maintaining and pursuing a tacit agreement and/or conspiracy with the defendant Avco Corporation to encourage, permit, enforce, and perpetuate the racially discriminatory employment practices.

Plaintiff Dennis, in his intervening complaint of July 29, 1971, alleges a racially discriminatory discharge on the part of Avco Corporation. He further alleges discrimination by Avco in the areas of initial employment, re-employment, promotions, demotions, transfers, suspensions and terminations. Dennis also alleges that defendant Avco permitted, encouraged, and condoned harassment and mistreatment of black employees by white employees. Dennis alleges that Aero Lodge No. 735 has participated in, encouraged, caused and attempted to cause this racial discrimination.

Plaintiff McCreary asserts in his intervening complaint of July 29, 1971, that he was the victim of a racially motivated suspension by defendant Avco. McCreary claims that he was also subjected to harassment because of his efforts to eliminate racial discrimination at Avco. As to Aero Lodge No. 735, McCreary claims that the union participated in, cause or attempted to cause this racial discrimination to which he was allegedly subjected.

Plaintiff Alexander filed a charge of discrimination with the EEOC on September 8, 1965. Alexander made the following charges of racial discrimination.

"4. Please tell your story of discrimination. Explain what unfair thing was done to you.

"I have worked as a laborer for about 12 years and as a janitor for about 2 years. I have not been given an opportunity to advance into other maintenance departments as white workers with less experience and seniority. I informed Avco that I had about twenty years experience as a concrete finisher and brick layer. I have been refused these type jobs because of my race. The union, Local 735 Machinists, nor the company has informed me of any jobs available that I could bid on in this type work." Exhibit "A" to Complaint, Civil Action No. 4335.

Plaintiff Robert F. Newman filed a charge of discrimination with the EEOC on May 2, 1966. This

charge as summarized in the EEOC decision of July 19, 1967, is as follows:

> "Charging Party alleges discrimination on the basis of race (Negro) as follows: that he was discharged from his job on the ground of failure to perform satisfactorily; that his request for transfer to another job was denied while a Caucasian employee holding the same job was transferred upon request; that Respondent has refused to reinstate him; and that his union failed to properly represent him in his complaint." Newman v. Avco Corp-Aerospace St. Div. Nashville, Tenn., supra, at 753.

The court concludes that the scope of the investigation which could reasonably be expected to have grown out of the EEOC charges of discrimination against Avco by Alexander and Newman covers discrimination in (a) classification as to the types of employment available to black people, (b) training, (c) working conditions, (d) promotions, (e) transfers, (f) compensation, and (g) terminations. Thus, these charges on discrimination, allegedly violations of 42 U.S.C. §2000e-2(a)(1), are proper allegations in the judicial complaints filed. The charges of discrimination by Dennis and McCreary in their intervening complaints are within the proper scope of the Alexander and

Newman judicial complaints. As to the alleged violations of 42 U.S.C. §2000e-2(c)(1) by defendant Aero Lodge No. 735, the scope of the Alexander and Newman judicial complaints properly encompasses allegations that defendant Aero Lodge No. 735 unfairly, inadequately, arbitrarily, discriminatorily, and in bad faith failed to properly represent black employees to protect them from discriminatory conduct by Avco in the areas of (a) classification as to the types of employment available to black people, (b) training, (c) working conditions, (d) promotions, (e) transfers, (f) compensation, and (g) terminations. Thus, provided the requirements of Rule 23(a) and (b)(2) are satisfied, plaintiffs may represent a class consisting of past black employees, present black employees, and prospective black employees of the defendant Avco who have been affected, are affected, or may be affected by these alleged discriminatory practices encompassed within the scope of the EEOC investigations of the charges made by plaintiffs Alexander and Newman.

Plaintiffs and intervenors may properly represent the above defined class provided the requirements of Rule 23(a) and (b)(2) are met.

Otis v. Crown Zellerbach Corporation, 398 F.2d 496 (5th Cir. 1968); Smith v. North American Rockwell Corp-Tulsa Division, 50 F.R.D. 515 (N.D. Okla. 1970); Butler v. Local No. 4 and Local 269, Laborers' International Union of North America (ALF-CIO), 308 F.Supp. 528 (N.D. Ill. 1969).

Rule 23(a) and (b)(2), Fed.R.Civ. P., reads as follows:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . .".

The numerosity requirement of Rule 23 (a)(1) is clearly satisfied as the class includes past, present and prospective black employees. Also, it is clear that a common question of fact exists as to all members of the class - whether they have been the subject of racially discriminatory employment practices. Carr v. Conoco Plastics, Inc., 423 F.2d 57, 63 (5th Cir. 1970). Also, the claims of the plaintiffs are necessarily typical of the claims of the class they represent. Butler v. Local No. 4 and Local No. 269, Laborers' International Union of North America (AFL-CIO), supra, at 533.

The remaining requirement of Rule 23(a) is that plaintiffs will fairly and adequately protect the interests of the class. Rule 23(a)(4).

The court holds that the plaintiffs and intervenors are adequately representatives of the class as defined since their interests are substantially the same as the interests of the members of the class. Williams v. Humble Oil & Refining Co., 234 F.Supp. 985, 987 (E.D. La. 1964). If the interests the class representative is protecting for himself individually are substantially coextensive with the interests of the members of the class, the court feels that this representative

will ordinarily be an adequate protector of the interests of the class. Clearly the two original plaintiffs, Alexander and Newman, and intervenor Dennis, who seek damages for alleged discriminatory practices, including the discharge of Newman and Dennis, have coextensive interests with the members of the class who allegedly have suffered or may suffer the same experiences. As to intervenor McCreary, he has interests which are coextensive with those of the class who would also benefit from the sought injunctive relief. The plaintiff Newman and the intervenors Dennis and McCreary seek reinstatement, and thus they have an interest in the abolition of racially discriminatory employment practices in the areas defined hereinabove, as to present and prospective black employees.

The court knows of no reason why the plaintiffs and the intervenors, through their counsel, will not properly and adequately represent the interests of the members of the class. Therefore, in the exercise of its discretion, the court holds that plaintiffs will fairly and adequately protect the interests of the class under Rule 23(a)(4).

As to the Rule 23(b)(2) requirement, the factual allegations of the complaints are clearly sufficient, as it is alleged that defendants have acted or refused to act on grounds generally applicable to the class, i.e., on the basis of race, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Therefore, the court holds that the plaintiffs and the intervening plaintiffs are proper representatives of a class consisting of past, present and prospective black employees of the defendant Avco Corporation, and past present and prospective black members of Aero Lodge No. 735, who allegedly have suffered or may suffer by reason of the alleged sicriminatory practices of the defendants. These plaintiffs have standing to properly challenge the alleged racially discriminatory policies and practices of the defendant company, Avco Corporation, in the areas of (a) classification as to the types of employment available to black people, (b) training, (c) working conditions, (d) promotions, (e) transfers, (f) compensation, and (g) terminations. Plaintiffs further have standing to challenge the alleged racially discriminatory policies and practices of defendant union Aero Lodge No. 735 in allegedly unfairly, inadequately, arbitrarily,

discriminatorily, and in bad faith representing the interests of black employees in these areas.

The court determines that it is not bound by the prior arbitration decisions in respect to claims of racial discrimination by plaintiff Newman and intervening plaintiff Dennis. This is true because the collective bargaining agreements which the arbitrators were authorized to interpret contain no provision forbidding racial discrimination by defendants Avco and Eero Lodge No. 735. Thus, the court should not defer to the fact finding of the arbitrators since they have no power to make findings on the issues of racial discrimination. Furthrer, the claims of racial discrimination by plaintiff Alexander and intervening plaintiff McCreary are not barred by any failure to exhaust contractual remedies. Even if exhaustion of contractual remedies is a condition precedent to a suit under Title VII, and this Court does not so rule, the collective bargaining agreements applicable to this suit contain no remedies for racial discrimination practices by defendant Avco. Thus, no contractual remedies were available whereby Alexander and McCreary could properly challenge any racially discriminatory actions taken against them.

Avco Pre-Act Background

Prior to the effective date of Title VII, July 2, 1965, Avco openly practiced racial discrimination in its employment practices and working conditions. Until 1960 or so, Avco relegated the few blacks who were hired to positions of janitor and laborer. All other jobs, the more desirable ones, were reserved for white employees. Avco did not permit black employees to eat with the white employees. Also, Avco maintained segregated toilet facilities and segregated water fountains. As a matter of practice, blacks were required to step aside and yield to white employees when the employees were lined up for whatever reason, such as to punch the time clock.

Avco supervision discouraged black employees from joining the union, advising blacks that it was to their interest not to so join. Avco supervision rarely told blacks about job openings, and offered black employees no formal or informal training.

In the middle and late 1950's the black employees began to press for promotions. Upon hearing rumors of job openings, blacks began to apply; however, promotions for all practical purposes were controlled at the foreman, assistant superintendent and superintendent level, positions held by white personnel. When a black employee sought a promotion, he was confronted with department seniority, an adverse recommendation from his foreman, his lack of experience, his inability to pass a non-validated test - usually a non-job-related intelligence or aptitude test. In addition, Avco had established and defined in writing the job classifications in such a manner that blacks could be easily eliminated from consideration. For example, the brick and stone mason requirements called for the use of algebra, geometry and trigonometry. No successful white applicant ever answered the algebra, geometry and trigonometry questions; however, a white man held the brick mason job until he died.

Although the company did not have continuous formal training, whites were given informal on-the-job training by their fellow white employees with the knowledge and acquiescence of Avco supervisors. Blacks were not promoted because they were not provided on-the-job training and, thus, did not have the necessary experience to qualify for the better jobs. However, whites with basically the same background as blacks were given the informal on-the-job training and promoted.

Union Pre-Act Background

Until 1957, the defendant union was segregated all-white, except for one black, who the union considered a curiosity and a show piece. The union discouraged blacks from making application for membership. It assured blacks that their interests were best served by their remaining outside the union. In 1957, the union permitted a few black employees to become members; however, the union did not encourage them to become active in union affairs. When there were strikes, the pickets paid by the union were all white. The union did not permit its black members to walk the picket line, but required them to clean the union hall as its janitors.

Until the 1971 collective bargaining contract, effective October 16, 1971, the union did not seriously negotiate with Avco for a non-discrimination clause. The union acquiesced in and encouraged segregation and racially discriminatory practices and conditions at Avco. Union leadership felt that it was proper and not wrongful racial discrimination to hire blacks only as janitors and laborers. When black employees filed grievances when they did not receive promotions, the union usually either lost the grievances or else did not act on them in good faith on

behalf of its black members. Prior to Title VII, the union generally refused to process grievances wihich alleged racial discrimination.

Seniority System

From the 1940's to 1968 Avco and the defendant union maintained departmental seniority by occupation with the provision that the airframe occupation, assembler-bench and jig, had plant--wide seniority. This seniority system applied to promotions, layoff and recall rights.

The 1968 collective bargaining contract modified the seniority system by eliminating the departmental seniority; however, it retained seniority by occupation and classification. The 1968 contract provided a more complicated promotion system. Under the new promotion system, employees desiring promotion could file with the Personnel Office job preference cards, or bids, for not more than three jobs. Under this new system, an employee in any department or occupation could bid on any jobs within the plant. However, even if the bidding employee had the most seniority under the order of priorities established, he could not get the job unless he was deemed "qualified" by Avco. For the purpose of determining "qualifications," an Avco official would interview the employee, and take into consideration such factors as related experience, performance on present job, educational background, test scores and mechanical aptitude. After th interview, the Avaco official would immediately advise the employee whether or not he was "qualified." If Avco deemed the applicant "qualified," his job preference for that position would then go on file. Thus, under th 1968 contract, an employee could only be promoted if Avco found him "qualified," with the amount of seniority being a secondary factor.

Assuming that the applicant-emplioyees were found "qualified" by Avco, the promotional system worked basically as follows. The applicant-employee with the most seniority in the occupation would have the first opportunity at the job. If there was no applicant-employee in the occupation, then the applicant-employee with the most seniority who filed ajob preference card would be entitled to the job. If the job was not filled under the first two priorities, Avco would post notices seeking applications from current employees. If no "qualified" employee responded to the notices, then Avco could hire a person from off the street, i.e., non-Avco individual.

The 1971 contract contained basically the same promotional bid system as under the 1968 contract, except that it allowed six bids, as opposed to three, to be on file. Also, the 1971 collective bargaining contract contained for the first time in Avco history a prohibition against racial discrimination by company and union. This anti-discrimination clause, Article XIV, Section 13 of the collective bargaining contract between Avco Corporation and Aero Lodge No. 735, effective October 16, 1971 provided:

> "Neither the Company nor the Union shall discriminate against any employee because of race, creed, color, sex or national origin, or because of participation or non-p;articipation in Union activity." Plaintiff's Exhibit No. 5.

Racial Discrimination at VCO

On July 15, 1961, Avco filed a report (Self Analysis Form) with the President's Committee on Equal Employment Opportunity. It is most revealing. At that time Avco had a total employment of 23784. Of that number, 32 were "non-white." All of the blacks were designated as "Charwomen, Janitors and Porters."

The Self Analysis Form reveals that: (1) Avco had no black foremen; (2) Avco had no black semi-skilled employees; (3) Avco had no black skilled employees; (4) Avco had no black administrative employees; and (5) *the white employees, because of departmental seniority, were frozen in their jobs*.

Some black employees filed complaints with the President's Committee on Equal Employment Opportunity in 1962 alleging racial discrimination in employment, promotion, job training, etc.

Avco, a company holding contracts for the manufacture of airplane parts, then advised its supervisory personnel that some blacks had to be promoted.

In 1963, out of a total of 2226, Avco employees, there were 41 black male and 2 black female employees. In 1964, out of a total of 1825 employees, there were 41 black male and 2 black female employees, this being no increase in the number of black employees over 1963. In 1965, out of a total of 2553 employees, there were 91 black male and 2 black female employees, an increase of 50 black employees in one year.

In subsequent years, Avco's employment statistics were as follows:

	TOTAL HOURLY EMPLOYEES	BLACK MALE	BLACK FEMALE
February, 1966	2335	140	0
December, 1966	3339	294	0
October, 1967	2727	259	1
October, 1968	2565	233	1
January, 1969	2919	295	11
January, 1970	3391	488	83
February, 1971	3318	406	69
January, 1972	2319	235	51

Approximately 16-17% of the population of the area from which Avco customarily draws a substantial majority of its employees are black. Approximately 17-18% of the population of the Nashville labor area are non-white.

As of July 9, 1971, Avco employed 725 whites in salaried jobs. Avco employed nine blacks in salaried jobs, which number includes black secretaries and clerks.

The court notes that, as of the date of the hearing of this suit, Avco had few blacks in the more desirable jobs. Of 50 engineers, Avco had one black. Avco had no black mechanic. Avco has never had a black superintendent, and did not have a black foreman until 1965. Most of the black employees were concentrated in assembler-bench and jig, which is one of the less stable occupations at Avco. On layoff these employees have tended to be the first to go.

Beginning in 1961 and continuing thereafter, due to governmental pressure, federal contract compliance requirements and the Civil Rights Act of 1964, Avco has taken actions which it claims have corrected and removed the effects of past discrimination. It claims that since July 2, 1965 it has not practiced racial discrimination in any of its employment practices, policies or conditions, but has complied in good faith with the 1964 Civil Rights Act and Order No. 4, 41 C.F.R. §60-2, Affirmative Action Programs.

Basically there are two general types of work for employees at Avco. One is incentive work, which has a production schedule with the amount of compensation determined by production of the employee or group of employees. The other is non-incentive work, the more desirable jobs of which are in maintenance, in which there are several departments, and which include such jobs as engineers, draftsmen, mechanics, brick masons, etc. Generally, there is more job stability in the Maintenance Department. By reason of departmental seniority, there have been few openings in

this department, which openings were sought by both whites and blacks.

In 1962 Avco promoted five black employees from the janitor and laborer classification to press operators. Referring to the press operator job, an Avco official who advanced through the ranks to management stated: "Frankly, I doubt if I could go down in the basement and run a press. These presses make people nervous. It made Robert [plaintiff Newman] nervous."

Thus, after years as custodians and laborers, five black employees, provided a training period of only a few hours, were placed on incentive work, under pressure, operating machines which were capable of cutting off fingers or a hand. Two of the five made the grade. Three of the black employees were returned to their previous classifications and their failure became a permanent mark of lack of ability on their work record. As to plaintiff Newman, it was used against him in the trial of this case.

From July 2, 1965, to 1968, black employees at Avco were subjected to discriminatory treatment by Avco. It was only through rumors and informal word of mouth that black employees could learn of job openings, while Avco supervision regularly informed white employees of openings. As is obvious, black employees were competing with white employees for those jobs. It is pertinent that Avco foremen and supervisory personnel, almost all white, ascertained that white employees had qualification which did not appear on company records. However, these same foremen and supervisory personnel considered black applicants solely on what was listed on their applications. Some of these applications had been on file for many years.

Avco supervisory personnel stated that they could not give informal on-the-job training to nonqualified employees. However, Avco supervisory personnel did give this type of informal training to white employees. Whites with less seniority than blacks were promoted to maintenance jobs even though some of those promoted were no more qualified than the blacks. Nonvalidated tests were given to employees who desired promotion. As previously stated, an outstanding example was the test for brick mason. Avco introduced no credible evidence to justify this test as being necessary or useful in determining whether individuals were qualified for this job. No employee who held the brick mason job passed the test.

However, it was a material consideration in preventing the promotion of plaintiff Alexander. A black employee was fired because of inability to perform a particular job assignment when whites, under the same conditions, were not. When whites, with substantial seniority, could not perform a particular job because of some inability, they were moved to other jobs which they were capable of performing. Blacks were not given such opportunities.

As a requirement of the collective bargaining contract effective August 12, 1968, an Avco official in the Personnel Office, Industrial Relations Department, began to interview all applicants for promotion. In some instances the applicants were given tests. However, in many instances, significant reliance was still placed on the evaluations of Avco foremen, assistant superintendents, and superintendents. These supervisory personnel insisted that there was no racial bias in their evaluations; however, the majority of these individuals thought the segregation practiced at Avco was not racial discrimination. Despite grievances and complaints alleging racial discrimination, both in on-the-job treatment and in promotions, Avco did not make an inquiry into whether or not the subjective evaluations of the black employees by the white Avco supervisory personnel were affected by racial bias.

Avco is bound by the knowledge and actions of its supervisory personnel. These Avco personnel both knew of and participated in practices, policies and conditions of racial discrimination. Numerous oral and written complaints about the racial discrimination at the plant were made to Avco officials and supervisory personnel. However, the Avco officials and supervisory personnel generally took no effective affirmative action, either before or after the effective dates of Title VII, to correct valid complaints of discriminatory treatment. Although Avco did require apologies in certain instances, it did not widely disseminate to its employees the fact of the apoligies.

Some other examples of racially discriminatory treatment of black employees since the effective date of Title VII are as follows:

(2) some white employees stated openly that they did not want to work with "niggers";

(3) white employees campaigned against a black employee for a union position, falsely asserting that the blacks were seeking and would get "super seniority" if the black was elected;

(4) white supervisory personnel assigned black employees to the more distasteful jobs; and

(5) Avco consistently allowed racially derogatory writing about blacks to remain on restroom walls, for example, "We hate niggers."

Globe-Wernicke Incident

The protestations of nondiscrimination, and the credibility by both Avco and Aero Lodge No. 735, were completely negated and destroyed by their actions in the Globe-Wernicke incident. As background, assembler-bench and jig is an assembly line occupation connected with the Avco airplane contracts. The demand for assembler-bench and jig employees fluctuates substantially, being affected by the completion of one contract and the acquisition of others. As a result of these fluctuations, these employees are generally the last to be hired and the first to be laid off at Avco. The great percentage of black employees hired after the effective date of Title VII were hired into this occupation. Seniority is defined as "length of service computed for each employee from his most recent date of employment." Thus, most employees in this occupation tend to accumulate relatively short seniority periods.

In 1971, Avco had projected that there would be a reduction of the assembler-bench and jig work force some months later between the fall of 1971 and January, 1972. However, a strike took place and the completion of a contract was delayed for a few weeks.

In the latter part of 1971, Avco phased out its Globe-Wernicke Division. None of the employees of the Globe-Wernicke Division, white or black, were qualified for the assembler-bench and jig occupation. Under the union contract, these Globe-Wernicke Division employees were not entitled to transfer to assembler-bench and jig, but were to be laid off when the Globe-Wernicke Division was phased out.

Included among the employees to be terminated by reason of the phasing out of the Globe-Wernicke Division were 73 white employees whose seniority dated from 1950 to August 12, 1960. Because of pressure from the defendant union, Avco agreed to

initiate a training program to train these employees in the assembler-bench and jig occupation and then hire them into this occupation. The effect of this was to place these 73 white employees ahead of those who had accumulated less than 11 years seniority.

As projected Avco shortly thereafter had a cutback in personnel in assembler-bench and jig. This resulted in terminating the regular assembler-bench and jig employees and retaining the old Globe-Wernicke employees who had been on assembler-bench and jig only two or three months.

Avco attempted to justify this procedure by asserting that it was hiring bench and jig employees from the street, i.e., new employees or former employees with no seniorty. The company and the union felt justified in training its old employees and hiring them instead of actually hiring new employees, even though this violated the collective bargaining contract.

In determining whether or not the defendants discriminated against black employees in the course of the Globe-Wernicke incident, the court must keep in mind the past racial discrimination practiced by both defendants. On this issue, the court finds the following. The procedure utilized violated the collective bargaining agreement in effect. Due to past racial discrimination, most black employees in assembler-bench and jig had very short seniority status. This procedure violated Avco's written affirmative action program. Avco recognized that this procedure would result in the termination of black employees legally entitled to their jobs on assembler-bench and jig. Avco, which had seniority lists in its possession, knew that a great many black employees, entitled to their jobs under the collective bargaining contract, would be terminated as a result of this procedure agreed on by Avco Corporation and Aero Lodge No. 735.

The court will now examine the effect of the procedure.[1/] The number of employees in assembler-bench and jig on January 14, 1972, totaled 898, of which 177 were black. Avco admits that at least 52 black emloyees lost their jobs as a result of this procedure. As of this time, the number of hourly employees at Avco totaled 2319, of which 286 were black.

[1/] The Avco official who agreed to this procedure was also the company official who had the responsibility to prevent and correct racial discrimination at the Avco plant.

Thus Avco and Aero Lodge No. 735, by this procedure , eliminated a substantial percentage of Avco's black employees and only a far smaller percentage of Avco's white employees. The sum and substance of their joint action was to state that white employees are entitled to preference over black employees in the area of job classification, working conditions, transfers, compensation and termination.

The court holds that such activity by Avco Corporation and Aero Lodge No. 735 constituted active and willful racial discrimination against black employees and union members in violation of Title VII of the Civil Rights Act of 1964.

Ramsey Alexander

This black man was born on March 29, 1917, and was employed by Avco on July 31, 1951. From 1951 until March 26, 1966, he worked essentially as a laborer, although prior to his employment with Avco, he had work experience as a brick mason. All through these years he endured the segregated and discriminatory practices and policies of Avco and the union. After he had worked for a short period of time with Avco, he was assigned to work as a helper to a brick mason named Stevenson, a white employee. On this assignment, Alexander performed the work required of a brick mason. After he had performed the work of a brick mason for an extended period of time, he filed a grievance against Avco in about 1958 under Article II, Section E of the collective bargaining contract asking to be upgraded. This contract provision provided that if an employee performs the work of a higher rated employee over a two week period, he is entitled to be upgraded to the higher rate provided he has sufficient seniority. Alexander had sufficient seniority at the time. His grievance was denied by Avco and not processed by the defendant union. Thereafter no laborer or general helper was permitted to help the brick mason for any continuous two weeks in succession.

Alexander filed a complaint with the President's Committee on Equal Employment Opportunity in 1962. This complaint resulted in Avco's elimination of certain overt discrimination and segregation. Also, Avco offered Alexander a promotion to incentive work. However, realizing that departmental seniority existed and that the more stable jobs were in maintenance, he refused the promotion. However, in 1962, Alexander and a few other black employees were promoted to the job of general helper, or helper-general, which paid only slightly more than a laborer. The duties were essentially the same menial ones as before.

Alexander remained in maintenance, and applied for the next opening as a brick mason in that department on July 12, 1965. Even though he had practical experience as a brick mason, he was denied that promotion. He also applied for several jobs between July, 1965, and March, 1966, but to no avail. The supervisory employees of Avco could not discover that Alexander had qualifications for jobs other than laborer or general helper.

In 1965 plaintiff was offered training in the occupation of assembler-bench and jig in another department of the plant. Plaintiff declined this training, preferring to remain in the Maintenance Department. His reasoning for this decision was sound in that promotions and lay-offs were departmental in 1965. This system of promotion theoretically allowed the most senior man in a department to get first opportunity at a job vacancy. The Maintenance Department contained several jobs which paid the highest wages in the plant. Plaintiff Alexander had accumulated substantial seniority in this department. If he had transferred he would have sacrificed his competitive standing in maintenance and diminished the number and variety of jobs available to him, since most of the departments wherein assembler-bench and jig was located had only this one occupation.

The brick mason Stevenson died in July, 1966, and Alexander applied for the job. Avco supervisory personnel denied him the job because of his lack of qualifications, including a lack of knowledge of algebra, geometry and trigonometry. Knowledge of algebra, geometry and trigonometry was listed by Avco as requirements for the brick mason job. However, according to the evidence presented in this case, no brick mason had such knowledge nor answered questions dealing with such subjects on the non-validated tests given to applicants. Defendant Avco introduced no credible evidence to justify such job requirements as being

necessary or useful for safe, efficient job performance as a brick mason.

Despite the brick laying experience of Alexander, Avco, through its substantially subjective evaluating procedures, denied him the job and hired a white person, a Mr. Cooper, who had not previously worked for Avco. Defendant Avco produced no credible evidence that the white person so hired possessed equal or superior qualifications to those possessed by Alexander.

Alexander, who joined the defendant union in 1957, has filed several grievances against defendant Avco, alleging that Avco failed to promote him due to racial discrimination. Defendant union, both before and after the effective date of Title VII, failed to process Alexander's grievance alleging racial discrimination. Defendant Aero Lodge No. 735 was less than vigorous in acting on Alexander's charges that Avco refused to promote him even though he possessed the requisite qualifications and seniority. Both before and after the effective date of Title VII, defendant Aero Lodge No. 735 has shown less vigor and enthusiasm in representing Alexander and other black members than it has in representing its white members.

Alexander filed a complaint with EEOC on September 8, 1965, alleging that he had been discriminatorily denied advancement. By letter dated December 13, 1965, the EEOC notified Alexander of the failure of their conciliation efforts and of his right to sue in federal court. This suit was filed on January 13, 1966. On March 26, 1966, Avco apparently discovered hidden talent in Alexander and promoted him to the position of oiler in the Maintenance Department after Alexander had filed a request for the position on March 15, 1966.

The maintenance-oiler position is not one requiring special skills or considerable training. However, the evidence shows that Avco, after attempting to discourage him from taking the job, required that Alexander take and pass a written test before he could be deemed qualified for the low-skill oiler position. Avco had not previously required other employees filling this position to take and pass such a written test. Alexander was also required to pass a "practical test," in which he was required to climb a high ladder while hot steam dropppings fell on him. The credible evidence shows that Avco had not previously required white employees to pass such a "practical test." Alexander

successfully passed both tests and was allowed to fill the oiler position on March 26, 1966.

The court holds that defendant Avco, by its practices in the area of promotions, engaged in racial discrimination against plaintiff Alexander in violation of Title VII of the Civil Rights Act of 1964 subsequent to the effective date of the Act.

The court further holds that defendant Aero Lodge No. 735 wrongfully discriminated against Alexander because of his race in refusing to protect Alexander's right under Title VII not to be denied promotions because of his race. Aero Lodge No. 735 discriminatorily represented Alexander in violation of Title VII, subsequent to the effective date of the Act, by providing unfair, inadequate, arbitrary, discriminatory and bad faith representation to Alexander. The representation provided by defendant union to Alexander was inferior to that representation provided to white union members.

Robert F. Newman

Robert F. Newman, a black man 52 years of age, was hired by Avco on May 9, 1951. He continued as an employee, except for occasional lay-offs due to reduction in force, until he was fired on February 1, 1966. From 1957 until the date of his discharge, Newman was a regular member in good standing of defendant union Aero Lodge No. 735. Through the first eleven years of his employment, he worked in the menial occupations of laborer and general helper. During these eleven years, Newman worked under segregated and discriminatory conditions with no training, formal or informal. White employees gave other white employees, but not black employees, on-the-job training. All supervisory personnel were white.

On October 20, 1962, after he filed a complaint with the President's Committee on Equal Empoloyment Opportunity, Newman was one of the five black employees transferred into the unnerving incentive work position of press operator, which required agility of movement and physical coordination. Newman was not offered a semi-skilled position in maintenance, but was offered this incentive position which placed in danger the worker's fingers and hands. After a minimum of instruction from a segregation-practicing foreman, Newman was expected to meet a production quota.

After approximately two weeks on the incentive job, Newman was returned to his former occupation of laborer. Newman claims he requested the return to his previous occupation because he had obtained information indicating a reduction in force in the press department. On the other hand, his supervisor stated Newman was afraid of the press and was apprehensive of injury. In any case, the foreman transferred Newman subsequent to his failure to make production.

Before discussing the last series of events which preceded his being fired, the court will analyze Newman's work record.

Newman is a large, slow talking and slow moving individual. He concedes he is slow to learn new tasks. Until 1964, Avco's primary complaint as to Newman's performance was that he was slow to learn, but that once he learned a job he could adequately perform it. Evidence was presented that Avco foremen had repremanded Newman on occasion for talking, drinking a Coca-Cola on the job, and wasting time. However, from 1951 to 1964, so long as Newman remained a laborer, Avco was basically satisfied with his work performance.

In October, 1964, Newman was transferred at his own request to an incentive job, a stove, or range, assembly line operation in Department 380. He was assigned to crating the finished product at the end of the assembly line. The credible proof indicates that he performed this job satisfactorily. Then, as a result of a cutback in production, Newman was transferred to assembly line production in another department in June, 1965. He was slow to learn, but eventually became a satisfactory employee there.

In October, 1965, Avco's quality of work increased and the stove assembly line reopened. Newman, with his many years of seniority, transferred back to Department 380. Because of his seniority, Newman would have been entitled to his previous crating job. However, a union steward, with less actual seniority, successfully claimed the crating job because of his artificial seniority due to his union position. The Avco foreman in charge of this department did not want Newman back on the crating job, stating that he felt that Newman could not perform the work. He explored the possibility of Newman's taking a demotion back to a laborer classification. Newman, however, refused the demotion. Then for some time Newman

was assigned to day work as a utility man instead of being placed on the assembly line. However, a white employee, Stover, could not perform the work at position #1 "stove lifter," on the stove line because of the extreme physical demands of the position. A less strenuous job was found for Stover in another department. Although there were several employees on the assembly line with less seniority than Newman, he was nevertheless assigned to this position on December 22, 1965. The evidence reveals that the job of stove lifter is the most physically demanding job on the stove line. It entails lifting from above the head a stove frame weighing approximately 50 pounds, placing it on the floor, performing several additional functions thereon, and then placing it on the move line for conveyance to another station. Newman was required to repeat this process every five minutes for the entire shift.

Newman advised the foreman that he was not physically able to do the job, but was told that he would do the job or would be reported to higher company officials. On the morning of his second day as stove lifter, when Newman insisted that he was working in pain, he was taken to the front office, where Avco suspended him for three days to give him time "to think it over." On the way home from the plant on the day of his suspension, Newman had an automobile accident in which he sustained injuries to his left hip, knee and ankle. After medical treatment for several days, Newman reported back to work at Avco on January 17, 1966, but the stove line was in the midst of a two-week shutdown. On company instruction, he reported again on January 24, 1966, when the stove line was reopened. He brought a letter from his personal physician stating that he was still disabled and would be so for two more weeks. He was then sent to Avco's Director of Industrial Relations, who advised him to obtain medical evidence of his disability. Newman obtained a statement from his personal physician, dated January 24, 1966, in which the doctor stated that Newman had "apparent residual disability of some minimal degree in the left knee." He was then sent to the company doctor. Newman testified that the company doctor just observed him from a distance of several feet and stated, "There is nothing wrong with you - you are just looking for sympathy." When Newman returned to work on January 31, 1966, at the direction of the Director

of Industrial Relations, he insisted that he was physically unable to perform the heavy work on station #1 on the range line and asked to be transferred to a less physically exacting position. Avco refused his request for transfer and fired Newman on February 1, 1966, after he had worked as stove lifter for approximately a day and a half.

At the time of Newman's discharge, the defendant Avco Corporation had other jobs which plaintiff could have performed satisfactorily to which he could have been transferred. Plaintiff had in fact requested such transfer to another job which he could perform both prior to and at the time of his discharge. In the department where plaintiff was working, several white employees had been changed from one job to another within the department, or had been encouraged to seek transfer to jobs under other supervisors when they were unable to perform or were unsuitable for the particular job to which assigned. This was the general practice of the defendant Avco where white employees were concerned.

Upon being notified of plaintiff's discharge, the defendant, Aero Lodge No. 735, declined and refused to raise the plaintiff's grievance that he had been the victim of racial discrimination. Instead, the defendant union filed a grievance charging a violation of the collective bargaining contract in that the company was wrong in its contention that plaintiff failed to perform his job properly. In the hearing on this grievance the defendant, Aero Lodge No. 735, urged that plaintiff had a right to receive at least two days of training on the new job. The defendant union refused to raise and prosecute plaintifff's grievance and contention that the defendant Avco accorded white employees privileges and prerogatives not accorded black employees, although there was considerable evidence to support the charge.

[Significant Findings and Conclusions]

On the issue of whether or not defendants Avco and Aero Lodge No. 735 violated the Title VII rights of plaintiff Newman subsequent to the effective date of the Act, the court makes the following findings and conclusions which it believes are particularly significant:

1. Newman was one of five black employees who filed a complaint of racial discrimination against Avco with the President's Committee on Equal Employment Opportunty in 1962.

2. As was its practice, Avco did not investigate to determine whether any racially discriminatory employment practices existed as alleged in the complaint filed with the President's Committee.

3. Avco's white stove line foreman did not want Newman on the stove line.

4. The Avco stove line foreman had previously made up his mind that Newman could not do the work.

5. The Avco foreman assigned Newman to the most difficult job on the stove line, leaving employees with less seniority in the less demanding jobs.

6. The Avco formean advanced no satisfactory explanation for Newman's assignment to the stove lifter job.

7. The Avco foreman permitted and assisted in the transfer of Newman's white predecessor, who could not physically perform the job, to a less strenuous job.

8. In the foreman's 25 years with the Avco Corporation, this was the first time he had taken an employee with Newman's number of years of seniority to the Avco front office to be fired.

9. Avco had transferred several white employees, physically incapable of performing a job, to less strenuous jobs in the past.

10. Avco had less strenuous jobs available to which Newman could have been transferred.

11. This was the first time in the company's history that Avco fired an employee with as many years of seniority as Newman possessed.

12. Aero Lodge No. 735 declined to include a charge of racial discrimination in Newman's grievance of his discharge in spite of considerable evidence that Newman was discriminatorily refused a transfer to a less strenuous position and discriminatorily discharged.

13. When Newman's private counsel amended the grievance to include a charge that Newman was fired because of racial discrimination, Aero Lodge No. 735 advised the arbitrator that it expressly disclaimed that part of the grievance.

14. Aero Lodge No. 735 refused to demand that Avco treat Newman in the same manner as it treated white employees and union members in the areas of job classification, working conditions, transfers and terminations.

The court holds that Avco's discharge of Newman and Avco's refusal to provide Newman with a less strenuous job was racially discriminatory in violation of Title VII of the Civil Rights Act of 1964. Avco discriminated against Newman in the areas of job classification, working conditions, transfers and terminations.

The court further finds that defendant Aero Lodge No. 735 unfairly, inadequately, arbitrarily, discriminatorily and in bad faith represented its member Newman in his efforts to be reinstated and in his efforts to be accorded nondiscriminatory treatment equal to the treatment afforded white employees and union members. Accordingly, the court holds that defendant Aero Lodge No. 735 discriminated against plaintiff Newman because of his race in violation of Title VII.

Intervenor Raymond L. Dennis

Intervening plaintiff Raymond L. Dennis, a black man, was hired by Avco on February 21, 1966, and fired on January 26, 1971. At all times during this period he was a member in good standing of Aero Lodge No. 735. Prior to his termination, his work record was generally clean except for an admonition for loitering at a soft drink machine on one occasion.

In 1970, Dennis became a board member of an organization known as the Cause-Find-Commission, formed by Avco black employees to eliminate racial discrimination existing at the Avco plant purportedly practiced by both defendant Avco and defendant Aero Lodge No. 735. The organization was formed as a result of what was felt to be an alarming rate of black employee terminations. Sometime in the fall of 1970, Dennis was elected by other employees as union committeeman of Department 928, a department in which groups of employees worked on assembly jigs in the manufacture of wings for the Lockheed L-1011 aircraft.

A union committeeman investigates complaints of the hourly employees, files grievances, and performs other duties incident to the well-being of department employees. In this project containing approximately 1500 employees, plaintiff Dennis was the only black union committeeman on the day shift. Often, black employees would approach him and he would give them guidance and assistance. Sometimes he would direct them to the plant committeeman, to their department committeeman if

they were not in his department, or to the Cause-Find-Commission.

In the fall of 1970, it came to the attention of plaintiff Dennis, in the course of his duties as a union committeeman, that three black employees who had been assigned to his department were transferred to another department in violation of their seniority rights. The seniority rights of the three should have allowed them to remain in Department 928, and employees with less seniority within the department would have ordinarily been transferred. Upon the transferring to the new department, the three black employees were "rolled" to the night shift. After the complaints were made to plaintiff Dennis, though he could not personally correct the situation since the employees were no longer in his department, he demanded an explanation from the foreman of Department 928. The foreman conceded to Dennis that the transfers were improper but attempted to justify the transfers on the ground that there were too many individuals on one side of the department working area. Shortly thereafter, two white women were transferred into the department. One of these white women was named Betty Urtubees, who had been transferred from the night shift. Night shift employees are unable to replace day shift employees unless the night employee has greater seniority. At the time of her transfer Miss Urtubees had only a few months seniority with the company. Dennis went to the foreman again for an explanation since the arrival of these employees was inconsistent with the earlier explanation given to him. Plaintiff Dennis was not given an adequate explanation for this inconsistency.

Miss Urtubees apparently enjoyed a continuing friendship with William Honeycutt, a superintendent of the L-1011 project, which included several departments, including Department 928. This friendship was evidenced by his regular visits to talk with her while she was in her working area.

Approximately a month or so after the transfer incident, around the first week in January, 1971, plaintiff Dennis encountered Superintendent Honeycutt near Department 928 reprimanding a black employee who was assigned to Dennis' department. Dennis approached the man and asked "What is going on?" At the time, plaintiff Dennis had his union badge plainly in sight. The superintendent replied to Dennis, "None of you damn business. Are you on union Time?" Plaintififf immediately secured the union plant grievanceman, returned to

Honyecutt's office, where Honeycutt, in foul language, refused to apologize to the black union official for examplifying such discrespect to him while he was carrying out his union responsibilities. Plaintiff Dennis thereafter filed a grievance against Superintendent Honeycutt. After the second step in the grievance procedure, Honeycutt signed a written apology. After pressure was exerted upon Honeycutt from higher company officials, Honeycutt was required to make an oral apology to the plaintiff.

On or about January 26, 1972, about two or three weeks after the aforesaid incident, plaintiff Dennis was fired by the defendant company on the alleged ground that he had said to two white female employees something to the effect of: "Slow down. We won't make overtime this way." A third employee, a white male, claimed that he overheard the plaintiff make this remark to one of the two females. One of the white females was Betty Urtubees.

On January 25, 1971, Honeycutt turned over to William Ashlaw, Manager of Labor Relations, three written statements from the three employees, all claiming that Dennis had made the aforesaid remarks concerning a slow-down. Thereafter, Ashlaw interveiwed Dennis in the presence of other union officials, and immediately suspended him and had Dennis escorted from the Avco premises. Thereafter, Ashlaw interviewed the three informants, who reaffirmed their statements that Dennis had made remarks concerning a slow-down. Ashlaw fired Dennis on January 26, 1971.

Pursuant to an investigation by the Manager of Labor Relations, no one else in the department came forth to support the allegations of the three white employees. The defendant union also made an investigation. All members of the department, other than the accusing white employees, advised union officials that they knew of no such "slow down" statements by Dennis. This particular department had primarily black employees at the time.

A grievance was filed by the union on behalf of Dennis and the grievance was submitted to arbitration. The arbitrator ruled in favor of the defendant company, stating that the punishment may be harsh, but noting in the decision that Dennis said in the arbitration hearing that if he made the remark, he made it jokingly. At the trial of

this suit, as the court interprets his testimony, Ashlaw asserted that even if Dennis made the remark jokingly, this was grounds for firing Dennis since he was a union committeeman.

At the trial of this suit, Dennis denied making the remark. This denial went uncontroverted since the defendants failed to put on witnesses claiming the contrary. No slow down ever occurred in Department 928 during the time Dennis was employed there. No other employees had ever been fired at the Avco plant for making an alleged "slow down" remark.

The two accusing white female employees did not like blacks, having made remarks to other white employees regarding their racial hostility toward black people. Miss Urtubees, a friend of Mr. Honeycutt, the superintendent who was forced to apologize to Dennis some two to three weeks earlier, specifically disliked Dennis. Dennis had on occasion asked Miss Urtubees for dates.

The court finds that plaintiff Dennis has proven by a preponderance of the evidence that Ashlaw, who fired Dennis, was at best an innocent conduit for the racial hostilities of an Avco superintendent and at least two Avco employees. Ashlaw, who had been Manager of Labor Relations at the Nashville plant since only September 15, 1970, is chargeable with knowledge of the historical racially discriminatory background and practices of Avco. However, between September 15, 1970, and January 26, 1971, when he fired Dennis, the Manager of Labor Relations made no inquiry into the past and current racial attitudes of Avco supervisory personnel. When Honeycutt brought the three accusing statements to him, the Manager of Labor Relations suspended Dennis and dispatched him from the premises without confronting the accusing witnesses or inquiring into their credibility. The Manager of Labor Relations fired Dennis without making a serious investigation as to whether or not the accusing empoloyees and/or the accusing superintendent had racial motivations behind their accusations. He did not inquire into past incidents and past statements which would have raised serious questions as to the motives of the accusers. He accepted without serious investigation the moral indignation expressed by the accusing employees as the reasons for their signed statements. The Manager of Labor Relations immediately accepted as true the written statements fostered, collected and delivered by racially biased supervision. Ashlaw testified that he fired Dennis without discovering that Honeycutt had been forced to both orally and in writing apologize to Dennis just a few weeks earlier in the same month, January, 1971. Ashlaw testified that he had no knowledge of this recent dispute, even though Dennis filed a grievance against Honeycutt, which was just recently settled at the second step of the grievance procedure. He further stated that he was not aware of any friendly relationship between Honeycutt and Miss Urtubees when he fired Dennis. The Manager of Labor Relations also testified that when he fired Dennis, he did not know of Miss Urbutees' dislike of Dennis for asking her for dates on occasion. The Manager of Labor Relations said that when he fired Dennis he was further unaware that Miss Urtubees was one of the two white female empoloyees who transferred from the night shift to the day shift in the fall of 1970. This transfer, which occurred after the transfer of three black employees to another department where they were promptly "rolled" to the night shift, was protested by Dennis in his role as union committeeman.

Plaintiff Dennis, as union committeeman, had been diligent and aggressive in protecting the rights of black employees in his department. The court finds that Dennis had done his job well as union committeeman and in so doing had angered and irritated Avco supervision, for example the foreman of Department 928 in the Urtubees transfer incident in the fall of 1970, and Superintendent Honeycutt in the January, 1971 incident in which Dennis protested the superintendent's reprimand of a black employee.

The court finds that statements such as "Slow down. We won't make overtime this way," were common expressions at the Avco plant, which statements were not and should not have been taken seriously or literally. The statements were commonly made in a joking manner and were so understood by Avco employees and Avco supervision.

The court finds that the charge of advocating a slow down was merely a pretextual basis for firing Dennis. The real reason for firing Dennis was Avco supervision's irritation and anger over Dennis' aggressive but proper representation of black employees. The court finds that Avco fired Dennis as an example to those other black employees who might be inclined to assert their rights under the collective bargaining contract and under anti-discrimination laws such as Title VII of the Civil Rights Act of 1964.

The court holds that the discharge of Raymond L. Dennis was racially discriminatory in violation of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. §2000e-2(a)(1).

As to defendant Aero Lodge No. 735, the court holds that it did not discriminate against plaintiff Dennis in violation of Title VII in its representation of Dennis as to his discharge by Avco Corporation.

Intervenor Warner McCreary

Warner McCreary, a black male with a high school education and a few hours of college credit, was accepted by Avco as a trainee in its Aircraft Assembly School on July 5, 1966. McCreary was employed in August 1, 1966, as an assembler-bench and jig, Class C employee. He was promoted to Class B as an assembler-bench and jig employee on November 25, 1967. He then bid for a job as a pattern maker, wood and metal, which he was awarded after taking company tests and reciving high marks. He began as a Class C employee in this pattern-making occupation in or about July, 1969, and was subsequently promoted to Class B in November, 1969. McCreary, the only black employee in the pattern-making occupation, was terminated because of a reduction in force in April, 1971.

Plaintiff McCreary was an organizer and leader of a black organization of Avco employees knows as the Cause-Find-Commission. As a leader of this organization, he engaged in many conversations and negotiations with both company and union officials in an attempt to relieve some of the many complaints of black employees at Avco Corporation and aid in eliminating racial discrimination and mistreatment. He was a member of Aero Lodge No. 735.

This employee experienced the follo discriminatory treatment while working at Avco.

1. He was reprimanded by Avco supervision for talking while he worked, even though his production was good. White employees were not so reprimanded.

2. He was reprimanded for the faulty work of a white employee. When the Avco supervisor was finally convinced that a white person was at fault, this white person was not repremanded.

3. White Avco supervision permitted criticism of white employees for talking to black employees.

4. McCreary was a candidate for plant grievance committeeman. A company man and a union official spread rumors that if McCreary were elected it would result in "super seniority" for blacks. The Manager of Labor Relations, William H. Ashlaw, refused to take any steps to correct the situation, and did not openly state to Avco employees that the rumors were false even though he knew them to be untrue.

5. McCreary, when promoted to the pattern shop as the only black therein, was hazed by the white employees. His tool box was stolen, his chain to tie down his tool box was broken, and he was pelted with clay balls. The Avco supervisor refused to take any action.

6. McCreary was called "nigger" by fellow employees and an official of defendant Aero Lodge No. 735.

7. When McCreary and other employees protested certain actions, Avco and Aero Lodge No. 735 officials referred to the blacks as "you people."

Subsequent to the firing of plaintiff Dennis on January 26, 1971, plaintiff McCreary participated in a mass walkout by some 100 or so black Avco employees in protest of the Dennis firing. The walkout lasted for about a week and a half. McCreary was suspended for thirty days, beginning with the first day of the walkout, for his part in organizing and participating in the walkout. The court holds that Avco's suspension of McCreary was not racially discriminatory in violation of Title VII, but was justified since participation in the walkout was a violation of the collective bargaining contract then in effect.

This employee, a quiet determined and perservering individual, was terminated by reason of a reduction in force in April, 1971. Plaintiff has not proven by a preponderance of the evidence that his termination was racially discriminatory or in violation of his seniority rights. Accordingly, the court holds that defendant Avco, by terminating McCreary in April, 1971, did not violate the rights of the plaintiff under Title VII of the Civil Rights Act of 1964.

As to defendant Aero Lodge No. 735, the court holds that plaintiff McCreary has not proven by a preponderance of the evidence that the union violated the rights of plaintiff under Title VII.

As far as the record shows, defendant union did not discriminate against plaintiff McCreary on the basis of race in its representation of the plaintiff as to his suspension and termination.

Accordingly, Warner McCreary is not entitled to injunctive relief against either defendant under Title VII.

Discrimination Against the Class

The court concludes that subsequent to the effective date of Title VII of the Civil Rights Act of 1964, July 2, 1965, the defendant Avco racially discriminated, in violation of the Act, against the class of Avco employees represented by plaintiffs as follows:

(1) by preserving through the seniority and promotion systems past discrimination in the areas of classification as to the types of employment available to black employees, training, working conditions, promotions, transfers, compensation and terminations;

(2) by failing, through its supervisory personnel, to afford black employees the same training afforded to white employees, thereby effectively excluding black employees from opportunities for advancement to semi-skilled and skilled occupations;

(3) by considering subjective and racially discriminatory evaluations of its foremen and other supervisory personnel in determining qualifications for advancement without ascertaining whether or not such evaluations were affected with racial bias; and

(4) by discriminating against black assembler-bench and jig employees in the Globe-Wernicke incident.

As to defendant Aero Lodge No. 735, the court concludes that defendant union has acquiesced and participated in these discriminatory practices of Avco, and has represented the interests of its black members unfairly, inadequately, arbitrarily, discriminatorily, and in bad faith in violation of Title VII of the Civil Rights Act of 1964.

The court has concluded that the plaintiffs and the class they represent may be afforded relief under Title VII of th Civil Rights Act of 1964, 42 U.S.C. §;2000e-2000e-15.

The attorneys for plaintiffs and defendants shall submit, within sixty (60) days from the entry of this memorandum, proposals stating specifically what relief is justified under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. by the findings and conclusions as stated in this memorandum.

/s/ L. Clure Morton
United States District Judge

DISTRICT COURT IMPLEMENTING ORDER OF AUGUST 20, 1974

UNITED STATES DISTRICT COURT
M. D. Tennessee
Nashville Division

CAPTIONS OMITTED

MEMORANDUM

MORTON, District Judge.

On July 12, 1974, a hearing was held in which attorneys for plaintiffs and defendants espoused their theories as to the implementation of this Court's memorandum opinion of December 18, 1973. Prior to the hearing, the parties to the lawsuit had filed their proposed plans. Essentially, the plaintiffs propound a scheme whereby this Court would monitor the daily activities of the defendants; the defendants' proposal, on the other hand, grants no relief to the plaintiffs. This Court, therefore assumes the duty of structuring relief which is formulated to remedy past discriminatory practices of the defendants. United States v. Masonry Contractors Association of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974).

INDIVIDUAL RELIEF

Plaintiff, Robert F. Newman, must be re-employed by defendant Avco with no loss of seniority. Furthermore, plaintiff is to recover from Avco those wages which he would have earned on and after December 30, 1967, less all income received by him from subsequent employment and unemployment compensation. The usual FICA and income tax withholding shall also be deducted from plaintiff's recovery.

Mr. Newman shall also be subject to any requisite physical examination of the company applicable to those employees who have been reinstated after a layoff from work.

Ramsey Alexander

Plaintiff, Ramsey Alexander, is to be awarded seniority status as a brickmason from July, 1966 to the present. Further, he is to recover from Avco those wages which he would have earned in the aforementioned status as a brickmason from August 1, 1966, to the present, minus any pay received from Avco during said period. Avoc is not required to displace any brickmason presently in its employ in order to compensate Mr. Alexander.

Raymond L. Dennis

Plaintif, Raymond L. Dennis, must be re-employed by Avco with no loss of seniority. Further, Avco is to compensate Mr. Dennis with those wages which he would have earned on and subsequent to January 26, 1971, less concomitant pay received by him from any employment, unemployment compensation, and the normal withholding for FICA and income tax. He shall also be subject to any requisite physical examination of the company applicable to those employees who have been reinstated after a layoff from work.

GENERAL RELIEF

The defendant Avco will implement the following procedures:

1. Up-to-date applications, which shall detail all educational background and previous work experience at Avco and elsewhere, will be taken from all black employees. Appropriate officers at Avco shall render good faith assistance to each black employee in eliciting the aforementioned information which shall be kept in a file with the employee's name affixed thereto. No other information, correspondence or documents

shall be placed in these files, which shall be adverted to hereafter as the "transfer" files.

2. Bid procedures currently in effect will be circulated in writing to all black employees.

3. "Occupational Recall" is hereby eliminated.

4. All job openings for non-supervisory employees shall be prominently posted in each of the company's working areas (e.g., "Bench and jig," "Maintenance," etc) not less than three days prior to filling the jobs. During said three-day period, black employees may go to the company office and make bids for the jobs during or subsequent to their respective shifts.

5. Blacks may bid on all job openings based on plantwide seniority without the contract limitation of occupational seniority. No limitation shall be placed on the number of bids which may be made annually by blacks.

6. Upon receipt of a bid from a black employee, the appropriate company "employee" (defined and designated, infra, No. 9) shall examine only the "transfer" file of such employee to determine the appplicant's fitness for the job opening. No other information, evaluation,

opinion or documentation shall be received or used by said company employee in ascertaining the fitness of the bidder.

In those instances where there are both black and white aspirants for a job opening, the company employee shall review only those up-to-date application forms of white employees which are similar to those of the black employees in the "transfer" file. Any other information, evaluation, opinion or documentations is strictly prohibited from review by said company employee in deciding between the black and white applicants.

Job equity is hereby eliminated as a factor in the aforesaid determination. The previous experience of an applicant, however, as reflected on an up-to-date application form, may be considered in the evaluation by the company employee as to who would best satisfy the job opening.

7. To offset the previous policy of informal on-the-job training when a black employee is selected for transfer to a new job, the black transferee shall be afforded twice the "customary trial period" to meet the job requirement than that given to white transferees. If the black transferee has not satisfied the job requirements within such stipulated time, he may be demoted to

his previous job position without loss of seniority, subject to the grievance procedure hereinafter set forth (No. 8, infra.). During such aforesaid period, good faith, informal, on-the-job training should be made available to the black employee by the immediate supervisory personnel.

8. When a black employee asserts that the foregoing steps have not been properly implemented or alleges that he is the subject of any racially discriminatory treatment, he may file a written grievance which sets forth his complaints against Avco through the company employee. Avco shall have five (5) days within which to evaluate the grievance. If the company determines that the grievance is proper, it must remedy the situation. If the company rejects the grievance, it shall notify the complainant in writing of its conclusion within five (5) days after the grievance was filed. Concomitantly, Avco shall also request in writing that the Federal Mediation and Conciliation Service submit a panel of five arbitrators. On receipt of the designation of the panel, the company shall submit said list of panelists to the complainant. Within three (3) days thereafter, the complainant shall deliver a written statement to

Avco in which the complainant selects one member of the designated panel to hear the grievance.

At the hearing, the company, the union, the complainant and his attorney, if any, may appear to submit evidence and argue the issues. A copy of the memorandum opinion of this Court filed December 18, 1973, and a copy of this particular memorandum shall be furnished to the arbitrator. The decision of the arbitrator, if supported by substantial evidence, shall be final and conclusive as to the company, the union and the complainant.

9. The "company employee" adverted to hereinbefore, may be any employee of the company who is not an officer, stockholder, director, and who was not a witness in the trial of this lawsuit.

10. The above plan will remainin effect for one year. The company shall file with the court within thirty (30) days from the date of this memorandum documents reflecting the total number of non-supervisory employees, their job classifications, their race and the number and percentage of blacka in each job classification. A similar report shall be filed at three-month intervals thereafter. A review of Avco's progress in alleviating racial discrimination will be

held by the court subsequent to the filing of the fourth quarterly report by said company. On application of any party, the court may consider an earlier review.

11. The provisions of the existing collective bargaining agreement and those of any future agreements between the company and the union are not binding if their enforcement is contrary to the provisins of this memorandum or if the enforcement would result in discrimination against any black empoloyee.

12. The defendant Avco is enjoined and restrained from racial discrimination of any kind in the classification, transfer, promotion or termination of its employees.

CLASS ACTION

Defendant contend that this cause must not continue as a class action. The basis for this assertion is that no notice has been given to any member of the class.

The action was sustained as a 23(b)(2) class action, Rule 23, F.R.Civ. P. The primary impetus of this suit is the expurgation of defendants' discriminatory employment practices. Pecuniary remuneration is purely incidental to this suit's

principal purpose. See Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); see also Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969).

In situations where both (b)(2) and (b)(3) are appropriate, it is said that the (b)(2) action is preferable because of its broader res judicata effect; this is especially the case in civil rights suits. See Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Johnson v. City of Baton Rouge, Louisiana, 50 F.R.D. 295 (E.D. La. 1970). To some courts the desirability of the (b)(2) action has appeared to emanate, at least in part, from the idea that notice is not required in (b)(2) actions (e.g., school desegregation and discrimination in employment cases).

There is, however, a growing body of authority, including the Sixth Circuit Court of Appeals, which espouses the theory that notice as a matter of due process is required in all representative actions if the resulting judgment is to be binding on absent class members; i.e., if there is no notice, there is no class action. Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Schrader v.

Selective Service Sys. Loc. Bd. No. 76 of Wis., 470 F.2d 73 (7th Cir. 1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2nd Cir. 1968); Pasquier v. Tarr, 318 F.Supp. 1350 (E.D. La. 1970), aff'd., 444 F.2d 116 (5th Cir. 1971); Cf, Gregory v. Tarr, 436 F.2d 513 (6th Cir. 1971), n.2, p. 514.

Thus one cannot assume that proper representation of the class plus any attendant publicity will meet due process. Due to the posture of the record in this cause, it is unnecessary to discuss what type of notice must be given in (b)(2) and (b)(3) cases. See Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); Mullane v. Central Hanover Back & Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Eisen v. Carlisle & Jacquelin, supra.

The Court concludes therefore that this cause must not proceed as a class action.

This does not terminate the matter however. In the previous memorandum filed in this cause,the court determined that approximately fifty-two (52) black employees were "laid off" in connection with the Globe-Wernicke incident. The court further found that said terminations were racially motivated, in violation of the collective bargaining

agreement and in violation of the affirmative action program of Avco. If the court merely determines that his cause can no longer proceed as a class action, the one-year statute of limitations in Tennessee may terminate what legal remedies the affected fifty-two (52) employees have. However, the court recognizes that while this cause is pending as a class action, the statute of limitations may be tolled. See American Pipe and Construction Co., et al v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). As a matter of fundamental fairness, considering the interest of efficiency and economy, and to avoid the possibility of mutitudinous litigation, the court feels that the approximately fifty-two (52) individuals hereinbefore mentioned not only should be given notice of this litigation and the termination of it as a class action, but they should also be given an opportunity to intervene in the matter under Rule 24 of the Federal Rules of Civil Procedure. See American Pipe and Construction Co., et al. v. Utah, supra.

The defendant Avco is directed to furnish the names and last known addresses of the black employees who were terminated as a result of the

Globe-Wernicke incident. The attorney for the plaintiffs will prepare, submit to the court for approval, and mail to said employees a notice of their right to intervene in this cause.

ATTORNEYS' FEES

The court finds that the plaintiffs, acting through their attorneys, are essentially vicarious "private attorney[s] general" who are striving to vindicate a policy that Congress considers of the utmost priority. Attorneys' fees will therefore be awarded. See, e.g., Milburn v. Huecker, Commissioner, 500 F.2d 1279 (6th Cir. 1974).

If the parties cannot agree on a suitable fee, an evidentiary hearing will be held for such determination.

Determination of the apportionment of attorneys' fees and the costs between defendants is reserved.

This case will remain on the active docket; jurisdiction is retained.

An appropriate order shall be entered.

Nos. 75-1776 and 2097-8-9

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RAMSEY ALEXANDER and ROBERT F. NEWMAN, et al.,
Plaintiffs-Appellees,

RAYMOND L. DENNIS and WARNER McCREARY,
Plaintiffs-Intervenors,

v.

AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AFL-CIO,
Defendants-Appellants
(75-1776 and 75-2098),

AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION,
Defendants-Appellants
(75-2097/9).

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed November 1, 1977

Before: EDWARDS and ENGEL, Circuit Judges and CECIL, Senior Circuit Judge.

ENGEL, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. EDWARDS, Circuit Judge, (p. 42) filed a separate opinion, concurring in part and dissenting in part.

Engel, Circuit Judge. These appeals involve two employment discrimination actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suits were consolidated for trial and present common issues concerning individual and class wide allegations of racial discrimination.

Plaintiff Ramsey Alexander, a black male, commenced a class action on January 13, 1966 against Avco Corporation's Aerospace Structures Division in Nashville, Tennessee (Avco) and against the union, Aero Lodge No. 735 of the International Association of Machinists and Aerospace Workers, AFL-CIO (Aero Lodge), which represents the hourly employees at that facility. Alexander alleged that on account of his race Avco had denied him certain promotional opportunities and that Aero Lodge had failed to represent him fairly. He sought to represent a class of black employees and job applicants, complaining that Avco had engaged in discriminatory practices as to them in the areas of training, transfers, promotional opportunities, and job classifications and that Aero Lodge had cooperated with the company in these practices.[1]

In 1971 the district court allowed two black males, Raymond L. Dennis and Warner McCreary, to intervene in this action, based on their allegations that Avco was racially motivated in discharging Dennis and in suspending McCreary and that Aero Lodge did not fairly present their grievances.

Plaintiff Robert F. Newman, a black male, filed a separate class action on December 30, 1968, alleging that Avco had unlawfully discharged him on the basis of his race and that Aero Lodge failed to process his grievance adequately. He raised allegations of discriminatory class wide practices similar to those contained in the Alexander complaint. Both plaintiffs sought injunctive and other equitable relief, as well as monetary awards for their lost wages. By an amendment filed shortly before trial, they also requested back pay for class members.

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[1] More precisely Alexander sought to represent blacks "who are likewise employed by the defendant, Avco Corporation, and are members of the defendant, Aero Lodge No. 735" and black "applicants and/or prospective applicants for employment by the defendant, Avco Corporation and for membership in the defendant, Aero Lodge No. 735 who are denied such employment."

On a summary judgment motion the district court dismissed Newman's complaint on the ground that he had made a binding election of remedies by earlier submitting his claim to an arbitrator. Rejecting that conclusion, this court reversed and remanded for a hearing on the merits. *Newman* v. *Avco Corporation,* 451 F. 2d 743 (6th Cir. 1971).

A consolidated trial was held between June 26 and August 5, 1972, and the parties presented evidence concerning the individual and class wide claims. By a memorandum decision of December 18, 1973, the district court sustained the individual claims of plaintiffs Alexander and Newman against both the company and the union. It sustained Dennis' claim against the company, but held that the union had in fact represented him fairly. The court found no violation of McCreary's rights. Further, the court held that the plaintiffs were proper representatives of a class:

> [C]onsisting of past, present and prospective black employees of the defendant Avco Corporation, and past, present and prospective black members of Aero Lodge No. 735, who allegedly have suffered or may suffer by reason of the alleged discriminatory practices of the defendants. These plaintiffs have standing to properly challenge the alleged racially discriminatory policies and practices of the defendant company, Avco Corporation, in the areas of (a) classification as to the types of employment available to black people, (b) training, (c) working conditions, (d) promotions, (e) transfers, (f) compensation, and (g) terminations. Plaintiffs further have standing to challenge the alleged racially discriminatory policies and practices of defendant union Aero Lodge No. 735 in allegedly unfairly, inadequately, arbitrarily, discriminatorily, and in bad faith representing the interests of black employees in these areas.

Significantly, this class did not include unsuccessful black job applicants, but only black employees at Avco. The court found that both the company and the union had engaged in several employment practices that unlawfully discriminated against the class.

Prior to this opinion there had been no formal determination under Rule 23(c)(1), Fed. R. Civ. P., as to whether the suits were properly brought as class actions. Three days before trial, the plaintiffs did file a motion for an evidentiary hearing on this question, but it was not expressly resolved until the decision on the merits 18 months later.

At a subsequent hearing the defendants contended that the failure to give notice of the suit to class members violated due process. The district court agreed and decertified the class on August 20, 1974, while allowing certain black employees to intervene individually. It ordered Avco to reinstate Newman and Dennis to their former positions, to promote Alexander to a better job, and to pay the men lost wages. However, upon reconsideration the court reversed this ruling as to the class and by a February 11, 1975 order reinstated the class action and required that notice be then given to the class members. The individual relief was reaffirmed and the defendants were required to comply immediately with a plan of general injunctive relief. Defendant Avco filed a timely motion to amend a small portion of the injunctive relief, which request was granted in part on July 16, 1975.

Following an additional hearing, the court entered an order on June 3, 1975 fixing the amounts of back pay for the individual plaintiffs and awarding attorney fees. A June 20, 1975 order slightly modified the latter award.

Both defendants noted an appeal from the orders of February 11 and June 3, and Avco also appealed from the June 20 order. The company and the union challenge the class action on procedural grounds, dispute the findings of discriminatory practices, and assert that the district court exceeded its authority as to certain aspects of the injunctive relief and by awarding excessive attorney fees.

We reverse in part the findings of class wide violations, vacate the injunctive relief, and remand for further proceedings. As to the individual claims, we affirm the orders as to Robert F. Newman and Raymond L. Dennis, but reverse as to Ramsey Alexander.

I. JURISDICTIONAL ISSUES

While not specifically raised by the parties, we consider the threshold question of jurisdiction of the appeal herein, because it is apparent that the orders appealed from are not final. Though the plaintiffs expressly requested an award of back pay for class members, the district court has not disposed of this particular prayer for relief.[2] Jurisdiction properly lies, however, under 28 U.S.C. § 1292(a)(1), because the defendants have appealed from an interlocutory order granting injunctive relief.[3] *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976).

We recognize that a court of appeals should ordinarily limit its review to the narrow question of whether the district court abused its discretion in issuing the interlocutory injunction, intruding into the merits of the case only to the extent necessary to decide that issue. *See Blaylock* v. *Cheker Oil Co.*, 547 F.

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[2] From language appearing in several orders and opinions, it is apparent that the district court contemplated an award of back pay to qualifying members of the class. Also the parties indicated that litigation over back pay was proceeding in the district court. However, we are unable to find any order expressly granting a class wide back pay award.

[3] Most of the injunctive relief was to remain in effect for only one year and that period has now expired. However, we are unable to hold that the issues raised are moot for this reason, because of the potential continuing impact upon the relationships of the parties.

2d 962, 964-65 (6th Cir. 1976); *Mercury Motor Express, Inc.* v. *Brinke*, 475 F. 2d 1086, 1091 (5th Cir. 1973); *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F. 2d 67, 70 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). The rule, however, is "one of orderly judicial administration and not a limit on jurisdictional power." *Mercury Motor Express, Inc.* v. *Brinke*, *supra*, 475 F. 2d at 1091. Such self-restraints, which are normally highly desirable in interlocutory appeals, are less attractive where, as here, the case is one of long standing, has already been tried on the merits, and where most of the issues are clearly defined. It is generally recognized that a court possesses the jurisdictional power on the appeal of an interlocutory order containing injunctive relief to reach and decide other aspects of the order which would not be independently reviewable by interlocutory appeal. *Deckert* v. *Independence Shares Corporation*, 311 U.S. 282, 287 (1940); *Myers* v. *Gilman Paper Co.*, 544 F. 2d 837, 847 (5th Cir. 1977), *resolved on other grounds*, — F. 2d — (5th Cir. July 29, 1977). We agree that:

> Once a timely appeal is taken from an order made appealable by statute, the power of a court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.

9 Moore's Federal Practice, § 110.25(1) at 273 (2d ed. 1975). *See, e.g.*, *Myers* v. *Gilman Paper Company*, *supra*, 544 F. 2d at 847; *E. P. Hinkel & Co.* v. *Manhattan Co.*, 506 F. 2d 201, 204 (D.C. Cir. 1974); *Hedburg* v. *State Farm Mutual Automobile Insurance Co.*, 350 F. 2d 924, 933 (8th Cir. 1965). Therefore, in the posture of this case, we will fully review the district court's rulings on the merits.

The defendants' appeals from the court's injunctive order of February 11, 1975 were technically premature because of the pendency of an outstanding motion to modify that order, which was not acted upon until July 16, 1975. Rule 4(a), Fed. R. App. P.[4] While the time for filing a notice of appeal properly commenced from this latter date, the omission is not jurisdictional. *United States* v. *Dean,* 519 F. 2d 624 (6th Cir. 1975); *Keohane* v. *Swarco, Inc.,* 320 F. 2d 429 (6th Cir. 1963). We decline to prejudice the appeal on this account, especially where the intent of the parties was clear and the appellees have in no way been misled. Given the choice, the court should prefer an excess of diligence to the absence of it.

II. PROCEDURAL ISSUES

The defendants contend that for several reasons these cases were improperly maintained as class actions and that relief to the class members should be denied.

A. Delayed request for class monetary relief.

Defendants urge that they were prejudiced by the failure of plaintiffs to request monetary relief for themselves and for the class members until shortly before trial, thereby depriving them of an opportunity to prepare an adequate defense to "unknown monetary claims." Apparently this issue has never been raised in the district court. There is no legal bar to

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[4] Rule 4(a) provides in part:

> The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

On February 19 Avco filed a timely motion to modify the February 11 order. Aero Lodge filed a notice of appeal from this order on March 10, while Avco noted its appeal on June 13. Neither defendant filed a notice of appeal following the entry of the order granting the motion in part.

raising back pay claims after the filing of a complaint for injunctive relief, or even after a trial on the merits of the discrimination claim, absent an actual showing of substantial prejudice. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 424 (1975). Because the defendants have failed to show specific evidence of prejudice and because there has yet been no class award of back pay, we think this question should be addressed in the first instance by the district court.

B. Failure to certify a class until the decision on the merits.

Defendants claim that they were prejudiced by the trial judge's failure to certify the class until after trial on the merits, which violated the provisions of Rule 23(c)(1), Fed. R. Civ. P.[5] Our circuit has held that the provisions of Rule 23 (c) (1) are mandatory and that the district court is required to enter an order of determination whether requested by the parties or not. *Senter* v. *General Motors Corp.,* 532 F. 2d 511, 520 (6th Cir. 1976); *Garrett* v. *City of Hamtramck,* 503 F. 2d 1236, 1243 (6th Cir. 1974). While the language of the rule is directed to the district court, *Senter* v. *General Motors Corp., supra,* 532 F. 2d at 521, we note that the Supreme Court has concluded that the named plaintiffs' failure to move for class certification prior to trial bears strongly on the adequacy of representation provided to the class members. *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 45 U.S.L.W. 4524, 4527 (U.S. May 31, 1977). Here the plaintiffs did not press the issue until three days before trial began on June 26, 1972.

Notwithstanding our strongly expressed views on the desirability of an early determination of whether a class action will be maintained, our circuit has required a showing of actual prejudice to the protesting party, *Senter* v. *General Motors Corp., supra,* 532 F. 2d at 521-22, which we are unable to discover here. The action itself was unquestionably filed as a class action and proceeded to trial on that basis. In both complaints allegations were made of class wide discrimination and the requested remedy was to benefit the class of which plaintiffs were members. The defendants recognized this feature of the suit by responding in their answers to the complaint with the affirmative defense that plaintiffs were not proper class representatives. On a motion to dismiss the Alexander complaint, the district court entered an order denying the motion and indicated that "the action is a proper class action." In Newman's appeal to this court, we noted that he was "an appropriate representative of the class described in the complaint." *Newman* v. *Avco Corp., supra,* 451 F. 2d at 749. Finally, the pretrial orders clearly stated that the named plaintiffs would seek to prove class discrimination and the trial itself proceeded on that basis. These considerations, together with the particular nature of the suit at hand, convince us that it would be a miscarriage of justice to deny class relief on this basis if it is otherwise justified.

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[5] Rule 23(c) (1) states:

> (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

C. Improper certification under Rule 23(b)(2).

Defendants claim that the district court erred in certifying the class under Rule 23(b) (2) because that subdivision contemplates only injunctive or declaratory relief and here monetary relief was also requested.[6] This claim is without merit.

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[6] Rule 23(b) (2) provides:

> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

Title VII actions alleging class wide discrimination are particularly well suited to 23(b) (2) treatment since "the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter* v. *General Motors Corp., supra,* 532 F. 2d at 525. A request for back pay does not preclude certification under that subdivision. *Senter* v. *General Motors Corp., supra,* 532 F. 2d at 525; *see Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 751, 755 (1976); *Head* v. *Timken Roller Bearing Co.,* 486 F. 2d 870, 876 n. 9 (6th Cir. 1973).

Likewise, defendants' claim that the class of black employees lacks the homogeneity contemplated under Rule 23(b) (2) is without merit. As we stated in *Senter* v. *General Motors Corp., supra,* "Race discrimination is peculiarly class discrimination." 532 F. 2d at 524. The class here is homogenous, as the discrimination in employment is claimed in all instances to be on the basis of one common characteristic, the race of the employee. Thus it is proper to certify a class under Rule 23(b) (2) even though "the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times." *Gibson* v. *Local 40, Supercargoes & Checkers,* 543 F. 2d 1259, 1264 (9th Cir. 1976).[7] Avco will have an opportunity later to prove that individual members of the class were not subjected to discriminatory employment practices. *See International Brotherhood of Teamsters* v. *United States,* 45 U.S.L.W. 4506, 4515-16 (U.S. May 31, 1977); *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 773 n. 32.

Along the same line, Avco argues in a supplemental brief that class certification was improper in light of the recent decision in *East Texas Motor Freight System Inc.* v. *Rodriguez,*

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[7] Defendants do not claim that the judicial complaints filed by Alexander and Newman contained allegations that were beyond the "scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Tipler* v. *E. I. duPont de Nemours & Co.,* 443 F. 2d 125, 131 (6th Cir. 1971). *See McBride* v. *Delta Air Lines,* 551 F.2d 113 (6th Cir. 1977).

45 U.S.L.W. 4524 (U.S. May 31, 1977), because the named plaintiffs do not "possess the same interests and suffer the same injuries" as the class members.

In *Rodriguez* the plaintiffs attacked a "no-transfer" rule and a seniority system on the ground that they perpetuated past discrimination and locked minorities into less desirable jobs in one unit of the business. Since the named plaintiffs had stipulated that they had not been discriminated against as to their initial hiring and since the district court found that they lacked the qualifications to be hired into the better jobs, the Supreme Court held that they were not proper representatives of the class of persons who had allegedly suffered injuries.

On the other hand, the named plaintiffs here complained of specific acts of discrimination that were typical of the category of practices raised on behalf of the class, and the district court ruled after a trial that the plaintiffs had in fact suffered by reason of certain of these practices. Thus, we think that the named plaintiffs suffered the same sort of injuries and possessed a sufficient similarity of interests to make them proper class representatives.

D. Lack of notice to absent class members prior to the decision on the merits.

Even if properly brought as a Rule 23(b) (2) action, defendants urge that the imposition of class wide liability was improper, because absent class members were not given actual notice of the suit prior to the decision on the merits, thereby, in their view, violating both Rule 23 and the constitutional requirements of due process. Individual notice was not required until the district court's order of February 11, 1975, about a year and a half after the decision on the merits.

Nothing in Rule 23 explicitly requires prejudgment notice to absent members of a class by virtue of a certification

under Rule 23(b) (2). The mandatory notice provision of Rule 23(c) (2) is expressly confined by its terms to actions under (b) (3),[8] and a number of courts have indicated that actual prejudgment notice is not required by Rule 23 in actions certified under sections other than (b)(3). *See, e.g. Bolton* v. *Murray Envelope Corp.*, 553 F.2d 881, 883 (5th Cir. 1977). *Ryan* v. *Shea*, 525 F. 2d 268, 275 (10th Cir. 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 254, *cert. denied*, 421 U.S. 1011 (1975); *Hammond* v. *Powell*, 462 F. 2d 1053, 1055 (4th Cir. 1972); *Yaffee* v. *Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1972); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (5th Cir. 1969).

Likewise we find unpersuasive defendants' contentions that due process requires prejudgment notice for absent class members in all actions under Rule 23 (b) (2). Generally, one is not bound by a judgment unless he was a party or in privity with a party to the action. *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). However, the judgment in a "class" or "representative" suit has been treated as an exception, and to an extent "not precisely defined by judicial opinion," it may bind members of the class who were not made parties to the litigation. 311 U.S. at 41. Due process is satisfied if the procedure "fairly insures the protection of the interests of absent parties." 311 U.S. at 42. Thus, the issue is whether prejudgment notice is in all cases required for (b) (2) actions in order to adequately protect the absent class members.

The Advisory Committee's Note to Rule 23 concluded that notice was not required in all cases of (b)(1) and (b)(2) actions, though it provided for discretionary notice under 23(d)(2):

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[8] Rule 23 (c) (2) states:

> In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

> Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. . . . [M]andatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.

39 F.R.D. 69, 106-07.

We agree with the Advisory Committee that prejudgment notice of a (b)(2) class suit need not in all cases be sent to absent class members to comply with the requirements of due process. *See* Comment, "The Importance of Being Adequate: Due Process Requirements in Class Actions under Federal Rule 23," 123 *U.Pa.L.Rev.* 1217, 1233-41 (1975); Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 *Harv. L. Rev.* 589, 605 (1974); 7A C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1786 at 143-44 (1972).

This position is supported by recent views expressed in other circuits. *Souza* v. *Scalone*, — F. 2d —, No. 74-3485 (9th Cir. Jan. 3, 1977); *Larionoff* v. *United States*, 533 F. 2d 1167, 1186 (D.C. Cir. 1976), *aff'd* 45 U.S.L.W. 4650 (U.S. June 13, 1977); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 878-79 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Frost* v. *Weinberger*, 515 F. 2d 57, 65 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976); *Wetzel* v. *Liberty Mutual Insurance Co., supra*, 508 F. 2d at 255-57. The district court expressly found that the named plaintiffs were adequate representatives of the class, as they possessed interests substantially identical to the class members. In addition, the court had authority to require notice if any of the purposes listed in 23 (d)(2) were in need of being served. Thus, failure to order prejudgment notice does not invalidate the class action here.

III. THE MERITS

Avco's Nashville facility is devoted primarily to the manufacture and assembly of aircraft parts. It has also in the recent past manufactured appliances and furniture for brand name distributors. Perhaps typical of the aircraft industry, total employment has fluctuated widely from time to time due to the nature of private subcontractor work on the aircraft projects. Thus, employment rose from 2335 persons in 1966 to 3391 in 1970, only to decline thereafter markedly until by November 15, 1975, only 1509 persons were employed.

Jobs at Avco are grouped into departments and occupations, with departmental lines having had great significance before 1968. Until 1971, occupations consisted of several related job classifications such as A, B and C categories in a particular craft or operator position, the A position being the most skilled and hence the best paying. Many occupations were found in several departments throughout the plant. The basic aircraft manufacturing occupation, known as "assembler-bench and jig," had the largest number of employees in the plant and was the focus of much testimony at trial. In 1971 the A, B, and C categories were abolished and instead the company used a system of varying pay levels within each occupation with automatic progression over a period of time. Occupations carry pay rates keyed to an hourly wage rate system of labor grades from 11 (the lowest) to 1 (the highest). Certain menial positions, such as janitor, are not in the grade system at all and pay less than the grade 11 rates. Many job rates can vary according to individual or group production output under an incentive system.

Job changes, including promotions, transfers, rollbacks and recalls, were governed until the time of trial by the detailed seniority provisions of the three successive collective bargaining agreements in effect since 1965. There was an overriding requirement that an employee be qualified to perform any particular job in question. The operation of the system is best paraphrased from the description contained in the brief of defendant Avco. In the 1965 contract between Avco and the Union, as in all subsequent labor agreements, seniority is "defined as length of service computed for each employee from his most recent date of employment", meaning the *plant service.* Employees were permitted by the 1965 agreement to bump to other jobs during a reduction in force, but only within a department. In other words, an employee utilized his company hire date, or "plant seniority", to bump other employees from occupations for which he was qualified by prior experience, but he did so only within his department. There was one exception to this pattern. Bumping in the assembler, bench and jig occupation was conducted on a plant-wide basis. Promotions under the 1965 agreement were awarded to qualified lower-classed employees, after first returning prior incumbents holding "equity", on the basis of plant seniority exercised within the department. In all situations, an employee assigned to a new department would compete with other employees of that department for promotional opportunities on the basis of plant seniority.

Major changes were negotiated by Avco and the Union in the seniority system incorporated in the succeeding 1968 collective bargaining agreement. Seniority continued to be defined solely on a plant-wide basis, but bumping privileges in the event of a reduction in force were broadened. Thereafter, an employee could displace a junior employee in a different department in either his current classification or in the last classification which he may have held in the other department, provided the bumping candidate satisfied certain conditions of minimum seniority and of satisfactory service when he sought a previously-held classification. If a bumping employee lacked the minimum seniority required, he could nevertheless displace a less senior employee in a lower classification of the same previously-held occupation.

Further, the scope of exercise of plant seniority was expanded for the purpose of promotion by the 1968 agreement. A new procedure of advanced bidding was instituted, which permitted an employee to compete for any job in the plant for which he was qualified irrespective of his particular departmental assignment. By filing a "job preference" card, a candidate for promotion could obtain placement, if qualified for the duty, on a job preference list, and thereby would become eligible for automatic promotion in line of plant-wide seniority when an opening became available. Openings not filled by advance bids were required to be posted on bulletin boards for the employees' scrutiny.

The next collective bargaining agreement between the company and the union was negotiated in 1971 and was in effect at the time of trial. Bumping privileges during a reduction in force were further expanded, being limited only in essence by a requirement of capability for the relevant work derived through prior service in the occupation in which bumping was desired. Promotional opportunities were improved by an increase in the number of permissible simultaneous job bids to six instead of the previous limit of three.

The evidence was convincing that prior to July 2, 1965, the effective date of Title VII, discrimination in employment was indeed substantial at Avco. In an area where 14.7% of the work force was black, only 1.3% of the employees of Avco were black in 1961. This increased by 1965 only to 3.6%. During that period those few blacks who were employed served almost exclusively in the lowest paid jobs, as janitors, porters, and charwomen. A self-analysis form furnished to the President's Committee on Equal Employment Opportunity in 1961 showed that Avco had no black foremen, no black skilled or semi-skilled employees, and no black administrative employees. Toilet, eating and other facilities were segregated by race, and many of those furnished for the use of blacks were inferior. Likewise, Aero Lodge had excluded blacks from membership altogether until 1957. Thereafter for many years there had been only a token membership of blacks in the union. The district judge found that the union had systematically discriminated against its black members in the processing of grievances and in the assignment of duties with respect to union affairs during this pre-Act period.

Following trial the district court held that the company and the union had violated Title VII by discriminating on the basis of race against the class of black employees by engaging in the following practices:

1) preserving through the seniority and promotion systems past discrimination in the areas of classification as to the types of employment available to black employees, training, working conditions, promotions, transfers, compensation and terminations;
2) failing, through its supervisory personnel, to afford black employees the same training afforded to white employees, thereby effectively excluding black employees from opportunities for advancement to semi-skilled and skilled occupations;
3) considering subjective and racially discriminatory evaluations of its foremen and other supervisory personnel in determining qualifications for advancement without ascertaining whether or not such evaluations were affected with racial bias; and
4) discriminating against black assembler-bench and jig employees in the Globe Wernicke incident.

A. Perpetuating Past Discrimination

In its opinion the district court found that Avco maintained a departmental seniority system until 1968 and thereafter retained seniority by occupation and classification. However, it is apparent that Avco's system did not employ departmental or occupational seniority in the traditional sense. While departmental units had great significance until 1968, during that period as in all others the measure of seniority was an individual's length of plant-wide service with the company. On the other hand, the existence of job "equity", which was the preference accorded an employee who had previously performed a particular job, tended to cause the competition for positions to be based in part on considerations akin to those in an occupational seniority system.

The district court, in its opinion, particularly stressed that the job equity feature was primarily responsible for perpetuating pre-Act discrimination. The 1965, 1968, and 1971 contracts all gave an absolute preference in filling a vacancy to employees with prior, satisfactory service in the particular occupation. In other words, whenever a vacancy occurred, all employees having equity in that occupation were given the right to return to that job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. Similarly, when layoffs were ordered, employees could return to occupations they had formerly held if their current jobs were eliminated. The effect of this system was that an employee with job equity would always be preferred over an employee without job equity, even though the latter was deemed qualified for the position by the company and had longer plant-wide service.

The plaintiffs complained that this system, though neutral on its face, discriminated against blacks where there had been an historical preference toward whites in awarding the better jobs. By giving absolute priority to those with any experience at Avco in a particular occupation, the company disproportionately excluded blacks from the selection process, where they had previously been denied that very experience.

The district court decision and the parties' initial briefing on appeal were made without the benefit of the recent Supreme Court pronouncement on Title VII coverage in *International Brotherhood of Teamsters* v. *United States*, 45 U.S.L.W. 4508 (U.S. May 31, 1977). There, the Court held that a bona fide seniority system which perpetuates the effects of prior discrimination is immunized from a finding of illegality by reason of § 703(h) of the Civil Rights Act, 42 U.S.C. § 2000e(h), which states in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin.

In reaching this conclusion the Court took a substantially different approach to Title VII litigation than had been followed in at least six of the circuits, including our own. *See, e.g., EEOC* v. *Detroit Edison*, 515 F. 2d 301 (6th Cir. 1975), *vacated and remanded in light of Teamsters*, 45 U.S.L.W. 3789-790 (U.S. June 6, 1977); *Palmer* v. *General Mills, Inc.*, 513 F. 2d 1040 (6th Cir. 1975); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973).

In *Teamsters* the defendant employer was a common carrier of motor freight with nationwide operations. Employees working as "line-drivers" engaged in long distance hauling between the terminals of the company and composed a bargaining unit which was distinct from that representing "city-drivers", who made deliveries within the immediate area of a particular terminal. The Fifth Circuit held that the company and the union had discriminated against black and Spanish-surnamed persons in the hiring process for the lucrative line-driver positions and in using a seniority system that penalized prior victims of discrimination. The Supreme Court agreed that the government had sustained its burden of proving a system-wide pattern or practice of employment discrimination. As for the seniority system, the problem was succinctly described by Mr. Justice Stewart:

> For purposes of calculating benefits, such as vacations, pensions, and other fringe benefits, an employee's seniority under this system runs from the date he joins the company, and takes into account his total service in all jobs and bargaining units. For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining-unit seniority that controls. Thus, a line driver's seniority, for purposes of bidding for particular runs and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal. The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line-drivers' "board."
>
> The vice of this arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the disincentive applied to all workers, including whites, it was Negroes and Spanish-surnamed persons who, those courts found, suffered the most because many of them had been denied the equal opportunity to become line drivers when they were initially hired, whereas whites either had not sought or were refused line-driver positions for reasons unrelated to their race or national origin.

> The linchpin of the theory embraced by the District Court and the Court of Appeals was that a discriminatee who must forfeit his competitive seniority in order finally to obtain a line-driver job will never be able to "catch up" to the seniority level of his contemporary who was not subject to discrimination. Accordingly, this continued, built-in disadvantage to the prior discriminatee who transfers to a line-driver job was held to constitute a continuing violation of Title VII, for which both the employer and the union who jointly created and maintain the seniority system were liable.

45 U.S.L.W. at 4511 (footnotes omitted).

The Supreme Court candidly admitted that this seniority system did, in fact, perpetuate the effects of discriminatory employment practices that occurred in the pre-Act period. Nevertheless it ruled that § 703(h) immunized such a facially neutral system as long as an intent to discriminate did not enter its adoption and it had been maintained free from any illegal purpose:

> The seniority system in this case is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into nonline-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.
>
> Because the seniority system was protected by § 703 (h), the union's conduct in agreeing to and maintaining the system did not violate Title VII. On remand, the District Court's injunction against the union must be vacated.

45 U.S.L.W. at 4514 (footnotes omitted).

Like the Supreme Court in *Teamsters*, we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters*, it applies equally to all races and ethnic groups. To the extent that it "locks employees into . . . jobs, it does so for all."

With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of a bona fide seniority . . . system". A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.[9]

Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination.

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[9] Under the Avco contracts, a long-time black employee, who in the remedy stage might prove himself entitled to preferential consideration for an upgraded job, would on qualifying gain an earlier seniority date, with its attendant benefits, than he would under the departmental seniority system in *Teamsters* and *Texas Motor Freight*. Conversely, see the impact upon less senior employees, many of them black, discussed with respect to the Globe-Wernicke incident, *infra* p. 23.

B. Globe-Wernicke Incident

The so-called Globe-Wernicke incident was not mentioned in the plaintiffs' complaints, and only became an issue midway through the trial on the merits. While no injunctive relief was specifically directed at remedying the effects of this incident, it is apparent that it loomed large in the Court's considerations of the case and thus we are compelled to address it here.

Late in 1971, while Avco's aircraft workforce in the assembler-bench and jig classification was expanding, its operation of a furniture manufacturing line for the Globe-Wernicke Company was terminated, and the employees of that division, most of whom had seniority dating back to the 1950's and 1960's, were faced with a layoff. The company's response caused the "incident", which is described in more detail in the district court's opinion. Except as later noted, the findings of fact, while disputed, are not clearly erroneous:

> As background, assembler-bench and jig is an assembly line occupation connected with the Avco airplane contracts. The demand for assembler-bench and jig employees fluctuates substantially, being affected by the completion of one contract and the acquisition of others.
>
> As a result of these fluctuations, these employees are generally the last to be hired and the first to be laid off at Avco. The great percentage of black employees hired after the effective date of Title VII were hired into this occupation. Seniority is defined as "length of service computed for each employee from his most recent date of employment." Thus, most employees in this occupation tend to accumulate relatively short seniority periods.
>
> In 1971, Avco had projected that there would be a reduction of the assembler-bench and jig work force some months later between the fall of 1971 and January, 1972. However, a strike took place and the completion of a contract was delayed for a few weeks.
>
> In the latter part of 1971, Avco phased out its Globe-Wernicke Division. None of the employees of the Globe-Wernicke Division, white or black, were qualified for the assembler-bench and jig occupation. Under the union contract, these Globe-Wernicke Division employees were not entitled to transfer to assembler-bench and jig, but were to be laid off when the Globe-Wernicke Division was phased out.
>
> Included among the employees to be terminated by reason of the phasing out of the Globe-Wernicke Division were 73 white employees whose seniority dated from 1950 to August 12, 1960. Because of pressure from the defendant union, Avco agreed to initiate a training program to train these employees in the assembler-bench and jig occupation and then hire them into this occupation. The effect of this was to place these 73 white employees ahead of those who had accumulated less than 11 years seniority.
>
> As projected, Avco shortly thereafter had a cutback in personnel in assembler-bench and jig. This resulted in terminating the regular assembler-bench and jig employees and retaining the old Globe-Wernicke employees who had been on assembler-bench and jig only two or three months.
>
> Avco attempted to justify this procedure by asserting that it was hiring bench and jig employees from the street, i.e., new employees or former employees with no seniority. The company and the union felt justified in training its old employees and hiring them instead of actually hiring new employees, even though this violated the collective bargaining contract.
>
> In determining whether or not the defendants discriminated against black employees in the course of the Globe-Wernicke incident, the court must keep in mind the past racial discrimination practiced by both defendants. On this issue, the court finds the following. The procedure utilized violated the collective bargaining agreement in effect. Due to past racial discrimination, most black

> employees in assembler-bench and jig had very short seniority status. This procedure violated Avco's written affirmative action program. Avco recognized that this procedure would result in the termination of black employees legally entitled to their jobs on assembler-bench and jig. Avco, which had seniority lists in its possession, knew that a great many black employees, entitled to their jobs under the collective bargaining contract, would be terminated as a result of this procedure agreed on by Avco Corporation and Aero Lodge No. 735.
>
> The court will now examine the effect of the procedure. The number of employees in assembler-bench and jig on January 14, 1972, totaled 898, of which 177 were black. Avco admits that at least 52 black employees lost their jobs as a result of this procedure. As of this time, the number of hourly employees at Avco totaled 2319, of which 286 were black.
>
> Thus Avco and Aero Lodge No. 735, by this procedure, eliminated a substantial percentage of Avco's black employees and only a far smaller percentage of Avco's white employees. The sum and substance of their joint action was to state that white employees are entitled to preference over black employees in the areas of job classification, working conditions, transfers, compensation and termination.
>
> The court holds that such activity by Avco Corporation and Aero Lodge No. 735 constituted active and willful racial discrimination against black employees and union members in violation of Title VII of the Civil Rights Act of 1964.

Defendants strenuously urge that the district judge not only misconstrued their intent in retraining and rehiring the laid off Globe-Wernicke employees, but that his reaction to the incident totally destroyed the reliability and impartiality of his other findings. While we cannot agree with so sweeping a conclusion, the court, profoundly affected by the evidence of the

incident, specifically commented, "The protestations of non-discrimination, and the credibility by (sic) both Avco and Aero Lodge No. 735, were completely negated and destroyed by their actions in the Globe-Wernicke incident."

We do not find clearly erroneous the district court's conclusion that Avco had projected a layoff in the assembler-bench and jig occupation and realized that a foreseeable consequence of rehiring the white employees would eventually be a layoff of newer employees, of whom a substantial number were black. The question then remaining is whether such conduct amounts to actionable discrimination.

We conclude in the first instance that the district court erred in holding that the rehiring of the Globe-Wernicke employees violated the collective bargaining contract. It is true that no obligation to retrain laid off employees of Avco existed under the collective bargaining contract. Under that agreement Avco was free to go into the open labor market to recruit new workers and to train them for service in the assembler-bench and jig occupation. It is further true that had Avco done so, workers so hired would have had less seniority than those who were ultimately displaced by the Globe-Wernicke employees. That the retraining and rehiring of the Globe-Wernicke employees was not demanded by the collective bargaining contract, however, is a far cry from holding, as did the trial judge, that the practice violated it. It simply did not. Rather, we conceive the real issue to be whether Avco had a duty to refrain from retraining and hiring recently laid off and more senior employees in order to protect the interests of newer employees, who enjoyed less seniority but were more racially balanced in their composition.[10]

We are loath to hold that the practice of a company and a union of retraining its older employees so that they could enjoy the benefit of continued employment is discriminatory in nature merely because its implementation tends to adversely affect the racial composition of the company.

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[10] The most senior Globe-Wernicke employee who was retrained traced his employment back to January 8, 1943. The least senior had been hired August 12, 1960. The average seniority of those employees dated approximately from October, 1954. Hence the average Globe-Wernicke employee had more than 17 years seniority when recalled in 1971 and 1972. Of the 124 assembler-bench and jig

In *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976), the union and the employer amended an earlier severance pay agreement in order to recall three white bricklayers, who had been laid off and had accepted severance pay. The incident occurred on June 15, 1966, and the court had already found that Wisconsin Steel had a past history of racially discriminatory hiring practices. The Seventh Circuit held that the revision of the severance pay agreement, by restoring contractual seniority rights for purposes of recall to the three white bricklayers, was racially discriminatory with respect to plaintiff Waters, a black bricklayer who had temporarily worked for the company, but not as to Samuels, who was a black applicant for the position. It commented:

> We do not doubt that a policy favoring recall of a former employee with experience, even though white, before considering a new black applicant without experience comports with the requirements of Title VII and Section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant.

502 F. 2d at 1320. We are in agreement and hold that Avco's retraining and rehiring of its laid off employees did not violate Title VII.

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employees laid off between March 3, 1972 and April 14, 1972, 52 were black and 72 were white.

None of the retrained Globe-Wernicke employees was black. There was no showing that any black employees in the Globe-Wernicke division were denied an equal opportunity for retraining. The racial composition of this group of employees may well represent, however, the discriminatory hiring practices of Avco before the Act. The possible liability of Avco to these older employees under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.,* had they been categorically refused retraining opportunities, was not raised.

C. Other Class Violations

The district court concluded that Avco and Aero Lodge discriminated on the basis of race in other employment practices, including preferential training opportunities for white employees and reliance on subjective and discriminatory evaluations made by supervisory personnel. Apparently the court also found that certain features of the promotional system, apart from the seniority system, perpetuated prior discrimination in various areas. There is, of course, no question but that discriminatory operation of a theoretically neutral promotional system can establish Title VII violations. However, we are unsure if the trial judge would have reached the same conclusions as to these additional practices absent his views with respect to the seniority system and the Globe-Wernicke incident.

We note that to some extent in making his findings, the trial judge relied on statistics comparing the percentage of employees at Avco who were black with the percentage of blacks in the general population of the Nashville area. On appeal Avco urged that use of these figures was improper, because they combined employees hired in the pre- and post-Act years and did not reflect the progress made since Title VII was passed. The company also argued that the relevant figure for comparison purposes was the percentage of blacks in the work force, which was lower than the figure for the general population. There is merit in these contentions. *See Teamsters, supra,* 45 U.S.L.W. at 4510 n. 20, 4515.

While the plaintiffs introduced into evidence other statistical exhibits segregating post-Act figures that indicated blacks were underrepresented in the better paying jobs, we do not know if these disparities were significant, especially in light of information submitted by defendants in rebuttal. Likewise, the statistical differences must be discounted to the extent they are simply a reflection of the impact of the bona fide seniority system, including its job equity feature. Since the district court issued its opinion, the Supreme Court has clarified the probative value to be accorded various kinds of statistical data in Title VII cases. *See Teamsters, supra,* 45 U.S.L.W. at 4509-510; *Hazelwood School District* v. *United States,* 45 U.S. L.W. 4882 (U.S. June 27, 1977). *Cf. Castaneda* v. *Partida,* 45 U.S.L.W. 4302, 4306 n. 17 (U.S. March 23, 1977).

From the foregoing, we believe the best course is to vacate the order containing injunctive relief and to remand for reconsideration of the class liability issue. The district court should re-evaluate the evidence before it in light of our comments here and of the holding in *Teamsters.*[11] Because of the impact of the recent Supreme Court decisions, we think it only fair that the trial judge be free in his discretion to reopen the proofs to the extent that it is necessary to give the parties an opportunity to present any additional testimony which may have gained relevance in view of the recent cases and of our opinion.

We make no comment concerning what should be the trial court's ultimate conclusions regarding the other employment practices mentioned above. However, the trial court will consider whether, absent consideration of the effects of the seniority system and the Globe-Wernicke incident, the remaining proofs as to one or the other, or both, of the defendants are sufficient to demonstrate by a preponderance of the evidence that unlawful discrimination has been a "regular procedure or policy," rather than an isolated and sporadic occurrence perhaps supporting individual claims of relief but not class wide charges.

While the preliminary injunctive order must be vacated and while any new remedial order will have to be subjected to its own scrutiny on the record then made, it is not inappropriate to comment on the order lest any of its deficiencies be otherwise perpetuated. A copy of that order is made an addendum to this opinion.

1) The provisions of numbered paragraphs 3, 4 and 5 are overly broad under *Teamsters* at least as they apply in general to black employees without respect to whether any particular employee has in fact shown himself to be aggrieved and to the extent they alter the operation of the seniority system.

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[11] The Court explained in *Teamsters:*

> At the initial, "liability stage" of a pattern or practice suit, the Government [plaintiffs' class here] is not required to offer evidence that each person for whom it will ultimately seek relief was the victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's [plaintiffs'] proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

45 U.S.L.W. at 4515 (footnote omitted).

The Supreme Court's further description of the procedure is illuminative. The purpose of a pattern or practice action or a class action under Title VII is not simply to benefit blacks generally as against whites; its purpose is to establish in the first instance whether the employer and the union have followed a pattern or practice of unlawful discrimination against the class. This, according to *Teamsters* entitles the plaintiff class to certain relief which would be uniquely and undeniably class wide and which would not relate to individual benefits. The elimination of generalized discriminatory conduct by way of the grant of injunctive relief is typical of such authority in the court upon a finding of class wide discrimination. Insofar as the individual claims of members of the class are concerned, generally *Teamsters* holds that the benefit from the class determination is that the force of the generalized proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision-making. Nonetheless at the remedy stage of the hearing where individual relief is sought, it must be individually addressed and resolved. The individual member must then come forward and demonstrate that he is a member of the class and that he has been adversely affected by the practice found discriminatory. He need not show the discriminatory intent of the company or union because that has already been established for the class. He must, however, show that he was a victim of the discrimination found. Once this is shown, and not rebutted by the defendants, the precise remedy is left to the discretion of the trial court acting under traditional equitable principles.

2) Paragraph 6 obviously would be inappropriate in view of the determination herein that job equity is a part of the bona fide system of seniority.

3) With respect to paragraph 7, which extended the probationary period for blacks to counter the previous policy of informal on-the-job training preferentially given to whites, we see no abuse of the trial court's discretionary equitable powers in this regard and note particularly that the Supreme Court has recently and specifically approved "catchup" educational programs for black school children similarly disadvantaged. *See Milliken* v. *Bradley*, 45 U.S.L.W. 4873, 4877-79 (U.S. June 27, 1977).

4) Paragraph 8 of the order is, in our view, overly broad and inconsistent with the particularized relief contemplated in *Teamsters*. There was no finding by the district court that the union grievance procedure is ineffective for processing the claims of blacks in general.

5) Also, paragraph 13 would appear to be no longer appropriate in view of the *Teamsters* decision.

We make the foregoing observations to be of some assistance to the district court and without indicating what conclusions should be reached on reconsideration.

IV. INDIVIDUAL CLAIMS

We will proceed to review the merits of the individual claims, because we do not think that a reconsideration of them by the district judge in light of *Teamsters* is necessary.

A. Ramsey Alexander

In his complaint filed January 13, 1966, Ramsey Alexander alleged that his applications for promotions or transfers to brickmason's helper, stationary fireman, and other occupations were denied despite his qualifications, and that white employees with less seniority and fewer qualifications were

awarded the positions. The difficulty with his claim is that most of the conduct of which he could justifiably complain occurred before the effective date of the Act. We therefore address only the post-Act claims.

On July 12, 1965 Alexander filed a form requesting consideration for the next opening in the brickmason occupation, and trial testimony focused on this application. He also filed a request for a "better job" in the maintenance department on December 14, 1965, for a job as a stationary fireman on November 23, 1965, and for a job as an oiler on March 26, 1966.

The district court concluded that Alexander had been denied a promotion to the job of brickmason because he lacked certain qualifications, including a knowledge of algebra, geometry, and trigonometry, while no Avco mason had ever possessed such qualifications. In addition he found that the individual eventually hired to fill the position did not possess qualifications equal or superior to those possessed by Alexander. It appears that the court also found that the departmental features of the seniority system before 1968 worked to Alexander's disadvantage, but of course *Teamsters* precludes a violation on this basis.

With respect to his request for employment as a brickmason, the unrefuted evidence was that the one and only position in that occupation remained filled by a long-time employee until July of 1966. Thus there was not in fact and could not have been any vacancy to be filled until that date. In March of that year Alexander had been offered and had accepted a position as an oiler. The uncontradicted testimony demonstrated that the company's standard practice was to cancel any outstanding promotion requests when an employee received a promotion as to any one of them. Thereafter, an employee had to refile the request in order to obtain further consideration for the other positions. When the brickmason opening occurred, Alexander did not have an outstanding request on file, and thus he was not considered for the job. He testified that he understood these promotional procedures at Avco, but he thought he should have been considered by virtue of his pending court suit. There was no indication that this requirement was selectively enforced. The first person thereafter filling the brickmason position was another black employee.

Alexander also claimed that before he was promoted to the position of oiler, he was discriminatorily subjected to written and practical tests, which were never given to other applicants. This is supported adequately by Alexander's testimony, but the difficulty is, of course, that he was promoted to the job and thus suffered no economic injury.

Accordingly, we conclude that in the face of the undisputed evidence, the court erred in deciding that Alexander was subjected to discriminatory post-Act practices by the company and the union. After being promoted to oiler, he was aware of the requirement that a new bid be filed for another promotion, but he failed to do so. There was no evidence that he was deterred from filing his application by any conduct of the company or the union, nor that the company kept from him the information that the position had become open upon the older employee's death. Neither did the evidence show that he was denied other promotions in the post-Act years on account of his race.

B. Robert F. Newman

Upon conflicting evidence, the district court found that Avco was guilty of racial discrimination in discharging plaintiff Newman and in refusing to transfer him to a less strenuous job. Newman claimed that the company had on other occasions found new jobs for white employees who could not perform the particular assigned work. This finding is not clearly erroneous and the award of benefits is affirmed. Newman's claim that the defendant union refused to include a charge of racial discrimination in his discharge grievance and otherwise failed to represent him fairly finds sufficient support in the record to require an affirmance of the union violation also.

C. Raymond L. Dennis

The district court found that Avco, but not Aero Lodge, had discriminated against intervenor Dennis by firing him in January, 1971 on the pretextual basis that he had advocated a slow-down among the workers. The real reason, the court found, was the company's irritation and anger over Dennis's aggressive representation of black employees. At that time Dennis was a union committeeman and had been a board member of an organization known as "The Cause-Find Commission," formed by Avco black employees to eliminate racial discrimination existing at the plant.

Upon hotly disputed evidence, we conclude that the district court findings of company discrimination are not clearly erroneous. Therefore the order of the district court, insofar as it pertains to the plaintiff Dennis, is affirmed.

Warner McCreary, a black male, and a trainee at the aircraft assembly school intervened as an individual plaintiff in the action. After trial, the court found that his claim of discrimination was without merit, and he has not appealed.

V. ATTORNEY FEES

While defendants have attempted to appeal the district court's award of atorney fees, as contained in its orders of June 3 and June 20, 1975, we decline to pass upon the merits of this question on this interlocutory appeal. The final judgment for attorney fees has not been entered. The district court retains jurisdiction to modify and amend the order upward or downward as the case may be and as may appear appropriate in light of the proceedings on remand.

In particular, the amount may be affected by the extent to which the earlier decision of class wide liability is superseded.

If the court should, upon reconsideration, conclude that there was insufficient evidence to establish a pattern or practice suit, the award of attorney fees would be appropriately reduced, as only the individual claims of Newman and Dennis would have been successful. On the other hand, if it should develop upon remand that class wide liability is reaffirmed and that further proceedings as to individual complaints of members of the class are necessary, then no doubt further revision of the attorney fees will reflect this circumstance and would be warranted.

Affirmed in part; reversed in part; and remanded to the district court for further proceedings not inconsistent herewith.

ADDENDUM

DISTRICT COURT ORDER OF FEBRUARY 11, 1975

A hearing was held in response to a motion to vacate the court's order of August 20, 1974, and for additional findings af fact.

It is ORDERED

(1) So much of the court's memorandum and order of August 20, 1974, which adjudged this cause must not proceed as a class action is hereby set aside and vacated. Said cause shall proceed as a class action as defined in the original memorandum of the court filed on December 18, 1973.

The memorandum and order of the court filed August 20, 1974, is further amended to provide the following relief:

(1) Up-to-date applications, which shall detail all educational background and previous work experience at Avco and elsewhere, will be taken from all black employees. Appropriate officers at Avco shall render good faith assistance to each black employee in eliciting the aforementioned information which shall be kept in a file with the employee's name affixed thereto. No other information, correspondence or documents shall be placed in these files, which shall be adverted to hereafter as the "transfer" files.

(2) Bid procedures currently in effect will be circulated in writing to all black employees.

(3) When an opening occurrs within any non-supervisory occupation within the bargaining unit which must be filled by the company, notice thereof shall first be posted on all plant bulletin boards for two (2) consecutive working days to enable qualified black employees to file bids thereon at the Industrial Relations Department on a form which shall be supplied by the company. Only black employees shall be eligible to file such bids. No such opening shall be filled

through the application of any of the recall or promotion provisions of any applicable collective bargaining agreement between the company and the union, unless no qualified black employee files a bid in accordance with the procedures specified in this Paragraph (3).

(4) At the close of the posting period provided for in Paragraph (3) above, any bids filed by qualified black employees prior to such closing in response to such notice shall be considered together with the claims of all other qualified employees, regardless of race or color, who are then holding placement on the job preference list for the occupation in question under the then current promotion provisions of the seniority article contained in the applicable collective bargaining agreement between the company and the union. The opening shall be awarded to the employee among such number who has the greatest amount of plant-wide seniority.

(5) Blacks may bid on all job openings based on plant-wide seniority without the contract limitation of occupational seniority. There shall be no limitation on the number of bids which may be filed by any black employee in accordance with Paragraph (3) above. Upon receipt of a bid from a black employee, the appropriate company "employee" (defined and designated, *infra*, Paragraph (9)) shall examine only the "transfer" file of such employee to determine the applicant's qualifications for the job opening. No other information, evaluation, opinion or documentation shall be received or used by said company employee in ascertaining the fitness of the bidder.

(6) In the implementation of the provisions of Paragraph (4) above, the company employee shall review only those up-to-date application forms of white employees which are similar to those of black employees in the "transfer" file. Any other information, evaluation, opinion or documentation is strictly prohibited from review by said company employee in deciding between the black and white applicants.

Job equity is hereby eliminated as a factor in the aforesaid determination; but the provisions of this Paragraph (6) shall not be deemed to prohibit the application of job equity as a factor in the event an opening cannot be filled under the procedures specified hereinabove. The previous experience of an applicant, however, as reflected on an up-to-date application form, may be considered in the evaluation by the company employee as to whether any claimant possesses the necessary qualifications for the duties of the occupation in question.

(7) To offset the previous policy of informal on the job training previously given to whites, but not to blacks, when a black employee is awarded a job opening hereunder, he shall be afforded a probationary period which shall be twice as long as the probationary period customarily and normally accorded to employees in the same occupation prior to the date of entry of this order. During such probationary period the black employee shall be given a fair and representative opportunity to demonstrate his qualifications to perform the duties required, and he shall be given all such familiarization and instruction as has heretofore been normally accorded to white employees during probationary periods in such occupation. Such familiarization and instruction shall be made available in good faith to the black employee by the immediate supervisory personnel in the department in which the opening occurs. If the black employee has not satisfied the job requirements within such double probationary period, he shall be returned to his former position without loss of seniority and with all rights unimpaired, subject to the grievance procedure hereinafter set forth in Paragraph (8).

(8) When a black employee asserts that the foregoing steps have not been properly implemented or alleges that he is the subject of any racially discriminatory treatment, he may file a written grievance which sets forth his complaints against Avco through the company employee. Avco shall have five (5) days within which to evaluate the grievance. If the company

determines that the grievance is proper, it must remedy the situation. If the company rejects the grievance, it shall notify the complainant in writing of its conclusion within five (5) days after the grievance was filed. Concomitantly, Avco shall also request in writing that the Federal Mediation and Conciliation Service submit a panel of five arbitrators. On receipt of the designation of the panel, the company shall submit said list of panelists to the complainant. Within three (3) days thereafter, the complainant shall deliver a written statement to Avco in which the complainant selects one member of the designated panel to hear the grievance.

At the hearing, the company, the union, the complainant and his attorney, if any, may appear to submit evidence and argue the issues. A copy of the memorandum opinion of this court filed December 18, 1973, and a copy of this particular order shall be furnished to the arbitrator. The decision of the arbitrator, if supported by substantial evidence, shall be final and conclusive as to the company, the union and the complainant.

(9) The "company employee" adverted to hereinbefore, may be any employee of the company who is not an officer, stockholder, director, and who was not a witness in the trial of this lawsuit.

(10) The above plan will remain in effect for one year. The company shall file with the court within thirty (30) days from the date of this order documents reflecting the total number of non-supervisory employees, their job classifications, their race and the number and percentage of blacks in each job classification. A similar report shall be filed at three-month intervals thereafter. A review of Avco's progress in alleviating racial discrimination will be held by the court subsequent to the filing of the fourth quarterly report by said company. On application of any party, the court may consider an earlier review.

(11) The provisions of the existing collective bargaining agreement and those of any future agreements between the company and the union are not binding if their enforcement is contrary to the provisions of this order or if the enforcement would result in discrimination against any black employee.

(12) The defendant Avco is enjoined and restrained from racial discrimination of any kind in the classification, transfer, promotion or termination of its employees.

(13) As to any future cut backs or reduction in force which may occur within a period of six months (6) months from the entry of this order, in determining whether or not black employees shall be laid off, the company shall, in applying its seniority provisions of its collective bargaining agreement, retain or lay off blacks based on plant wide seniority instead of occupational seniority.

It is ORDERED that the defendant Avco shall furnish to counsel of plaintiffs within thirty (30) days from the date of entry of this order, the names and addresses of all employees of the class which they have in their possesion and which are available to them. The defendant Avco shall likewise post a copy of the Notice (Appendix A) for a period of sixty (60) days on the bulletin boards throughout the plant and buildings of Avco and the defendant Aero Lodge shall post a copy of the said Notice at the office and operations building of said Lodge.

It is further ORDERED that upon receipt of said names and addresses from defendants, the plaintiffs will mail or cause to be mailed by regular mail to each such individually identified member of said class as defined in this order, a copy of said Notice (Appendix A). This mailing will be at plaintiff's expense.

In order to give notice to prospective black employees and members of the defendants who are or may be members of said class, the plaintiffs will publish at their expense four (4) consecutive weekly publications in a newspaper of general circulation in Davidson County, Tennessee, of said annexed Notice (Appendix A).

It is further ORDERED that the defendant Avco and Aero Lodge No. 735 immediately implement the provisions of this order.

It is further ORDERED that a hearing will be held in this cause on March 7, 1975, to determine amounts due the plaintiffs Robert F. Newman, Ramsey Alexander and Raymond L. Dennis and the amount of attorney's fees for said plaintiffs.

The case will remain on the active docket and jurisdiction is retained and all other matters are reserved.

/s/ L. CLURE MORTON
UNITED STATES DISTRICT JUDGE

EDWARDS, Circuit Judge, concurring in part and dissenting in part. Like my colleagues, I recognize that the Supreme Court's opinion in *International Brotherhood of Teamsters* v. *United States,* 45 USLW 4506 (U.S. May 31, 1977), requires our remand of this case to the United States District Judge for his reconsideration. In *Teamsters* the Supreme Court noted: "It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." *Id.* at 4514. I do not find any such concession in this record and I assume that the trial judge is free to make his own original determination as to whether or not the seniority system had "its genesis in racial discrimination" and whether or not "it was negotiated and has been maintained free from any illegal purpose."

Additionally, I disagree with my colleagues' analysis of the Globe-Wernicke matter. No matter how desirable a general policy of training laid-off employees for future job opportunities in their former employer's plant might be, if, as the District Judge appears to have held here, it is done for the first time in the history of the company in a situation where the company's past employment policy was clearly discriminatory to black employees and the company knows that the new program will have the result of eliminating 52 out of the total 286 black employees in the plant, in my view the Judge was not clearly erroneous in finding the practice to be discriminatory.

ORDER OF JANUARY, 24, 1978
DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CAPTIONS OMITTED

ORDER

Before: EDWARDS and ENGEL, Circuit Judges and
CECIL, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the appellees has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it presents no meritorious issue which was not dealt with fully in the majority opinion and Judge Edwards' opinion, concurring in part and dissenting in part.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

Supreme Court, U. S.
FILED
MAY 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1522

RAMSEY ALEXANDER, et al.,
Petitioners,

versus

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

and

AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION,
Respondents.

RESPONDENT AERO LODGE NO. 735's BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

QUESTION PRESENTED

When a body of high-seniority laid-off employees had an arguable contractual right to immediate recall for training and then production work in a different skill, was such recall by the employer at the Union's insistence rendered an unfair employment practice in violation of Title VII of the Civil Rights

Act of 1964 by the fact that the employer knew that there would have to be a substantial layoff during the following months, and that more recently employed low-seniority black employees would therefore suffer earlier layoff as a result of such recall?

II

STATEMENT OF THE CASE

In addition to the aspects of the Globe-Wernecke recall described by petitioners (Petition for Certiorari, pp. 7-10), the triennial collective bargaining agreements between respondent AVCO and respondent Union at all material times had provided for two types of recall rights following layoff, occupational recall and general recall, and the forms utilized by AVCO to permit employees to register for recall at the time of layoff contained blocks for the employee to choose between general recall and occupational recall (R. 1004-1005).[1] Any employee who opted for occupational recall would be entitled thereby to recall by seniority in the occupation from which he was laid off. Each employee who opted for general recall would be entitled to recall into any occupation or job in the plant for which he was qualified after all employees having job equity in such occupation had been recalled to work; *e.g.*, employees who opted for general recall had a right to be recalled to the first available employment, by seniority, in preference to new employees AVCO would otherwise be hiring off the street.

Earlier, when AVCO lost a contract for the assembly line manufacture of freezers, freezer employees who opted for general recall had been recalled for training and subsequent production work in aircraft assembly bench and jig (R. 1004-1005). Later, when AVCO lost its Philco assembly line in 1964, Philco employees who opted for general recall instead of occupational recall were hired and placed into assembly bench and jig training and then production when AVCO again started hiring new bench and jig workers (R. 283, 1005-1009).

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[1] Record references are to the pagination of the Joint Appendix in the Court of Appeals.

On the occasion of the Globe-Wernecke layoff, over 150 employees were laid off, many with more than 20 years' seniority (R. 674, 670), 73 of these employees opted for general recall and were put into assembly bench and jig training followed by production assignment in this occupation, and the Union throughout insisted that these employees were entitled to recall as a matter of contractual right, both in the District Court and in the Court of Appeals. The evidence submitted by the Union and herein summarized was subjected to no effort at refutation either by the petitioners or by the respondent AVCO.

Additionally, although AVCO had projected a future layoff, there was no evidence offered to prove that the respondent Union had knowledge of such projection. The only evidence on the subject of such possible knowledge was the testimony of the Union's business representative that he knew there was no imminent projected layoff at the time of the Globe-Wernecke recall, because he had been told by an AVCO official that although there was to be a phase out of the C-5A aircraft wing construction work, there was to be a simultaneous increase in the L-1011 aircraft wing work which would take up the C-5A people (R. 1026, 1029), and no effort was made by any party to refute this testimony.

III

ARGUMENT

It is the position of respondent Union that the Writ of Certiorari should be denied because (1) the question petitioners desire to present is a hypothetical one not raised by the case and (2) the record establishes that neither of the two remaining plaintiffs who have petitioned for certiorari is a member of the class of employees laid off early as a result of the Globe-Wernecke recall, and they therefore lack class action representational authority and standing to raise the issue they present.

The District Court, in holding that the Globe-Wernecke recall violated the collective bargaining agreement, enunciated no rationale related to any provision of the agreement as to how the recall violated the contract, and in its holding, it did not even take any notice of the respondent Union's insistence that the general recall provisions of the collective bargaining agreement gave the 73 Globe-Wernecke employees an absolute contractual right to be recalled to perform the same services that AVCO was employing people off the street to perform—training in the assembler bench and jig occupation followed by assignment work in that occupation (31a-35a).

In its reversal of the District Court's holding that the Globe-Wernecke recall violated the bargaining agreement (100a-104a), the learned Court of Appeals stated its conclusion, "It is true that no obligation to retain laid off employees of AVCO existed under the collective bargaining contract." (103a) In such statement of its conclusion, the Court of Appeals did not state its rationale, took no note of the Union's argument as to general recall rights and enunciated no theory why employees who had opted for general recall had less rights than new employees AVCO was then hiring off the street, the right of assignment to training duty followed by assignment to production duty.

Thus, while the Court of Appeals gave the lack of any conflicting evidence proper effect in holding that the record contained no evidence of unfair employment practices in denial of a promotion to the plaintiff Alexander (108a-110a), it failed to give such effect to the lack of conflicting evidence in regard to the Globe-Wernecke employees' exercise of their general recall option (103a).

If respondent Union be incorrect in its long standing insistence that these employees had an absolute right under the seniority system to general recall to training assignment followed by production assignment, it is nevertheless certain that neither of the lower courts has enunciated any rationale endeavoring to demonstrate that the Union's position is incorrect. It is certain that if AVCO had refused to honor is general recall obligations to these 73 employees, it could have raised no valid defense to its obligation to arbitrate a Union grievance under *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Hence, the Union and the employer evidently could properly compromise the claim of settlement to recall under *Humphrey v. Moore*, 375 U.S. 335 (1964).

Under these circumstances, it would appear that the question petitioners seek to present actually involves the enforcement or recognition of claimed seniority rights evidenced both by long usage and specific provisions of the collective bargaining agreement, so that petitioners seek herein to re-litigate issues resolved by the Court in *International Brotherhood of Teamsters v. United States*, — U.S. —, 52 L.Ed.2d 396 (1977), pursuant to the rationale of *Washington v. Davis*, 426 U.S. 229 (1976) and *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Further, the record conclusively established that the two remaining plaintiffs lacked class action standing to question the

Globe-Wernecke recall, because each of these remaining plaintiffs were old employees with considerable seniority who had been discharged some years before the Globe-Wernecke layoff and recall and who, even if they had not been discharged, would not have been among the body of new junior employees subject to earlier layoff by virtue of the Globe-Wernecke recall. The only racial wrongs of these two petitioners which were remedied were the wrong of being subjected to discriminatory discharge on the ground of race, and neither of them claimed to have been prejudiced by any operation of the seniority system similar to its operation in the Gloge-Wernecke incident. Respondent Union, in regard to the individual claims of these two petitioners, was held guilty only in its processing of petitioner Newman's arbitration case and was not held guilty of any racially discriminatory conduct in regard to the petitioner Dennis.[2]

Under the teaching of *Singleton v. Wulff,* 428 U.S. 106 (1976), as applied in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976) (particularly 428 U.S. at p. 62, n. 2), the present petitioners were not so prejudiced as "to satisfy the 'case or controversies' requirement of a federal court's Art. III Jurisdiction." (428 U.S. at p. 62, n. 2). Accord: *East Texas Motor Freight System Inc. v. Rodrigez,* —U.S.—, 52 L.Ed.2d 453 (1977). Though the physicians in *Planned Parenthood, supra,* in being denied in fact the right to perform abortions, shared a community interest with a large class of mothers being denied the right to have abortions, and though that large class of mothers necessarily included a smaller class who objected to being deprived of their parental rights, the physicians suffered no loss from the deprivation of parental rights to some members of the larger class and their own relation to the smaller class was an emotional and philosophical one, which this Court held an inadequate basis for class action representational authority. The same rationale applies in the instant case.

---

[2] In the lengthy trial, none of the witnesses were early lay-off victims of the Globe-Wernecke recall.

WHEREFORE, respondent Aero Lodge No. 735 respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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No. 77-1522

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAMSEY ALEXANDER, et al.,
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vs.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, AFL-CIO, and AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION.
Respondents.

BRIEF FOR RESPONDENT AVCO CORPORATION IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENT AVCO CORPORATION IN OPPOSITION

OPINIONS BELOW

Respondent Avco accepts Petitioners' statement of the opinions below.

JURISDICTION

Respondent Avco accepts Petitioners' statement of jurisdiction.

QUESTION PRESENTED

Did Respondent Avco violate Title VII of the Civil Rights Act of 1964 when it retrained and recalled a group of recently laid-off and more senior employees to aircraft assembly work, because the incumbent aircraft employees enjoyed less seniority but were more racially balanced in their composition than the recalled group?

STATUTORY PROVISIONS INVOLVED

Respondent Avco accepts Petitioners' statement of the statutory provisions involved.

STATEMENT OF THE CASE

Petitioners filed their complaints in these consolidated class actions on January 13, 1966 and December 20, 1968, respectively, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* Respondent Avco denied any violation of Title VII, as well as all allegations of the complaints other than formal averments.

At the trial, toward the conclusion of Petitioners' case in chief, they called an Avco official as a witness, and among other things questioned him as to compliance with commitments under Avco's Affirmative Action Program, with specific emphasis on the training of black employees for aircraft assembly work and other jobs. In his testimony, the official mentioned the training for aircraft assembly work of a group of long-service employees, all of whom were white, who had worked for Avco in a furniture manufacturing project conducted under a contract with the Globe-Wernicke Company. These employees had been laid off after performance of the contract was completed. They received no wages or other compensation during

their training, but were thereafter recalled by Avco for aircraft assembly work. At the time, the alternative would have been to hire and then train new, inexperienced employees "off the street". Several months later, a reduction in force took place in aircraft assembly operations, and because of their seniority rights, these former Globe-Wernicke employees retained their aircraft jobs longer than a group of other employees, some of whom were black, who had worked longer in aircraft assembly but did not have equivalent plant-wide seniority.

The Globe-Wernicke employees were trained in two schools, the first of which included 73 individuals and the second 19, for a total of 92 persons. The subsequent aircraft force reduction resulted in the layoff between March 3, 1972 and April 14, 1972 of 124 aircraft assembly workers, 72 of whom were white and 52 of whom were black. Obviously, the layoff of the entire group of 124 employees during that period cannot be attributed to the training of the 92 white Globe-Wernicke employees. Moreover, all of the 52 black employees laid off from the aircraft assembly operation would in any case have been laid off within the next two or three weeks, even if the Globe-Wernicke contingent had been laid off first, as is demonstrated in Avco's Report to the Court, filed in the District Court on September 16, 1974.

The training of the Globe-Wernicke employees in aircraft assembly work was conducted at the request of the Respondent Union, the representatives of which insisted that such a course of action was consistent with the general recall clause of the collective bargaining agreement and was in accord with past precedent. The precedent relied upon by the Union occurred in 1964, when a project for the Philco Company was completed and the laid-off Philco employees were recalled for other jobs after requisite training.

The Court of Appeals concluded as a matter of law that the collective bargaining agreement neither prohibited nor required the training and subsequent recall of the laid off Globe-Wernicke employees, and that under the agreement, "Avco was free to go into the open labor market to recruit new workers and to train them for service in the assembler-bench and jig occupation." 565 F. 2d at p. 1380. The opinion observes that while the training and recall of the Globe-Wernicke employees was not demanded by the collective bargaining contract, this proposition "is a far cry from holding, as did the trial judge, that the practice violated . . . [the contract]. It simply did not."[1] Instead, the majority conceived "the real issue to be whether Avco had a duty to refrain from retraining and hiring recently laid-off and more senior employees in order to protect the interests of newer employees, who enjoyed less seniority but were more racially balanced in their composition."[2]

Under the collective bargaining agreement between Avco and the Union in effect at the time of the Globe-Wernicke incident, seniority was defined solely on a plant-wide basis. Bumping privileges were accorded to employees affected by a reduction in force, limited in essence only by a requirement of capability for the relevant work derived through prior service in the occupation in which bumping on the basis of seniority was desired. Promotional opportunities were afforded to employees in accordance with a procedure of advanced bidding, which permitted an employee to compete for any job in the plant for which he was qualified, irrespective of his particular departmental assignment. By filing a "job preference" card, a candidate for promotion could obtain placement, if qualified for the duties involved, on a job preference list, and thus would become eligible for automatic promotion in accordance with plant-wide seniority when an opening occurred. Openings not filled by advance bids were to be posted on bulletin boards for the employees' examination. Six simultaneous advance job bids could be filed by any employee.

The Court of Appeals held below that this seniority system was immunized by Section 703(h) of the Act.[3] Petitioners have not sought review by this Court of the holding of the Court of Appeals that the seniority system maintained by Avco and the Union was a bona fide system within the meaning of Section 703(h).

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[1] 565 F. 2d at p. 1381.

[2] *Ibid.*

[3] The opinion observes: "Like the Supreme Court in *Teamsters,* we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters,* it applies equally to all races and ethnic groups. To the extent that it ' "locks" employees into . . . jobs, it does so for all.' " 565 F. 2d at p. 1378.

ARGUMENT

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1. The Globe-Wernicke issue was an extraneous, non-determinative question. As stated by the Court of Appeals, the incident was not mentioned in the Plaintiffs' complaints and only became an issue midway through the trial on the merits. Furthermore, as stated by the Court of Appeals, no injunctive relief was specifically directed at remedying its effects. 565 F. 2d at p. 1379.

Not only did the original pleadings not address this issue, but there was no amendment to the pleadings that did so, either by pretrial order or otherwise. It is true that the incident, as stated by the Court of Appeals, "loomed large in the [District] court's considerations of the case". However, the Court of Appeals declined to agree with the contention of Avco that the District Court's reaction to the incident "totally destroyed the reliability and impartiality of his other findings". 565 F. 2d at p. 1380. Indeed, the Court of Appeals affirmed the District Court on two out of three of its decisions as to racial discrimination against plaintiffs or intervening plaintiffs, and affirmed its award of back pay to them in spite of the fact that in both cases arbitrators had ruled in favor of Avco.

Rule 19 suggests that only "decisions" may be reviewed by certiorari. Neither the District Court nor the Court of Appeals made a "decision", in the normal sense of the word, regarding the Globe-Wernicke incident. The District Judge regarded it as racially discriminatory, and the Court of Appeals disagreed with his finding. But a finding is not a decision. Perhaps the reason there was no amendment to the complaints relating to this incident, after the District Judge indicated his view of it, was that the black employees said to have been discriminated against would have been laid off anyway within a matter of days. While there was no evidence to this effect in the record before the Court of Appeals, the figures were introduced later into the record in the District Court. These figures demonstrate the error in the District Judge's view that the cut-back resulted in "retaining the old Globe-Wernicke employees" (33a) while the jobs of black employes were "terminated" (34a).

2. There is no conflict between the decision of the Court of Appeals in this case and the decisions of this Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 97 S. Ct. 1843 (1977), *United Airlines* v. *Evans,* 431 U.S. 553, 97 S. Ct. 1885 (1977), and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 96 S. Ct. 1251 (1976). On the contrary, the decision of the Court of Appeals not only is compatible with, but is constrained by the rationale of those precedents. *Teamsters* holds that ". . . an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at p. 353, 97 S. Ct. at p. 1864. "*Evans* holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee."[4] *Teamsters* and *Evans* expand upon

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[4] This is how the Court in *Teamsters* actually believed it was ruling in *Evans,* according to footnote 30 of the opinion in *Teamsters.* 431 U.S. at p. 348, 97 S.Ct. at p. 1861. Footnote 30 goes on to conclude, "Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post- Act discrimination."

this Court's initial holding in *Franks* "that §703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination."[5]

The Court of Appeals held below as a matter of law that the seniority system embodied in the collective bargaining agreement between Avco and the Union was a bona fide seniority system within the meaning of §703(h) of the Act. The Court of Appeals said:

> "A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system." 565 F. 2d at pp. 1378-1379.

Petitioners do not challenge the quoted conclusion of the Court of Appeals, and it therefore must be taken as correct, which we assert it clearly was.

Petitioners do not contend—and the District Judge did not find—that Avco had discriminated against blacks by excluding them from training for aircraft assembly jobs.[6]

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[5] This is how the Court characterized *Franks* in the *Teamsters* opinion. 431 U.S. at p. 346, 97 S. Ct. at p. 1860.

[6] The record shows that in 1965 Avco began an intensive effort to hire and train black persons in aircraft assembly skills, in which most of its openings occurred, and in that year 16% to 17% of the persons hired were black. Thereafter, the target black enrollment in each training class under MDTA and JOBS programs was 50% —a proportion which was actually *exceeded* in 1969 and 1970. Defendant's Exhibit Q (page 2), shows an overall black enrollment in the first seven aircraft training classes of 63.07%.

It follows that the training of the laid-off Globe-Wernicke employees in aircraft assembly skills cannot be viewed as racially discriminatory *per se*. What the District Judge decided—and what Petitioners now urge—is that the training of the Globe-Wernicke employees should be considered to be racially discriminatory because of the fact that Avco's seniority system automatically honored the plant-wide seniority dates of the Globe-Wernicke employees. This happened when they were recalled to work in aircraft jobs, where they took precedence over less senior employees, some black but more of whom were white, with more aircraft service but less plant-wide seniority. The simple and incontrovertible answer to this contention is that such a so-called "impact" constitutes nothing more than "the routine application of a bona fide seniority system", and is immunized from attack by §703(h) of the Act under the doctrine of *Teamsters, supra,* 431 U.S. at p. 352, 97 S. Ct. at p. 1863.

Petitioners' statement of the question presented recites that the employer provided a "special training program for an all-white group of employees", for the purpose of discriminating on the basis of race against black employees. This is an incorrect and misleading statement. The Globe-Wernicke training program was not "special" in the sense that it was offered only to these employees. Practically all the employees in the aircraft assembler-bench and jig occupation had been given similar training, including the black employees who were the subject of the subsequent layoff. The reason was stated by Frank T. Foster, supervisor of employment, who was called as a witness by Petitioners:

> "Well, in 1965 we set upon a big hiring program for the training of people for aircraft work because Nashville just doesn't have trained aircraft mechan-

> ics or trained aircraft people. We hired both blacks and whites and put them in these schools we run every so often. I think the ratio of that was about between 16, maybe 17 percent blacks who were hired to train for that, those particular schools during the year 1965." (R. 605).

Not only were black employees hired and put in these schools, but black employees in lower-paid jobs were also given the opportunity to transfer to assembler-bench and jig jobs after being trained (R. 268-269, 293, 667). Moreover, prior to the so-called Globe-Wernicke incident, a group of employees laid off from the Philco operation had been similarly trained (R. 1044-1051).

Thus, it appears that the particular training program in which these Globe-Wernicke white employees were trained was nothing new and certainly was not purposefully discriminatory. The fact that this particular group was "all-white" was pure happenstance.

It is incorrect to say, as do Petitioners, that the white Globe-Wernicke employees were inferior "in seniority" to the 52 black aircraft workers who were subsequently excessed—along with 72 whites—when the aircraft force was reduced. Both the Globe-Wernicke employees and the laid-off black employees possessed at all times seniority computed from their original dates of hire under the collective bargaining agreement, as the Court of Appeals opinion demonstrates. 565 F. 2d at p. 1379. It is only by reason of the lack of prior aircraft qualifications and experience on the part of the white Globe-Wernicke employees that they had not previously been placed in aircraft jobs. Clearly, to impart aircraft skills to the Globe-Wernicke employees in a training school was neither the recognition of additional seniority nor the restoration of lost seniority, and the recall of the Globe-Wernicke employees upon the completion of training was in no sense a "revision" of the seniority system. Their seniority remained constant at all times.

At the time the laid off Globe-Wernicke employees were trained for aircraft assembler-bench and jig work, Avco had already assigned to this work all available employees, including laid-off employees, who had sufficient training (R. 669-670). Since these laid-off Globe-Wernicke employees desired to be trained for aircraft work, Avco's only alternatives, other than the one it chose, would have been to: (i) take the position that they were not eligible for training because they were laid-off employees with plant-wide seniority; or (ii) refuse to train them and give them the available jobs except on condition that they give up their seniority. If Avco had pursued either of these courses, it would have subjected itself not only to a charge of reverse discrimination but also to a charge of commission of an unfair labor practice, for the reason that the asserted seniority rights of the Globe-Wernicke employees under the collective bargaining agreement were "but an extension of the concerted activities that gave rise to that agreement". *A.S. Hubbs*, 163 NLRB 292, 296 (1967). The Court of Appeals pretermitted this point, which was fully presented at pages 28-37 of Avco's main brief in the Court of Appeals.

3. There is no conflict between the decision of the Court of Appeals in this case and the decision of the Seventh Circuit in *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). In this case the Court of Appeals expressly relied upon *Waters* in holding that Avco's "retraining and rehiring" of the laid-off Globe-Wernicke employees did not violate Title VII, quoting with approval from the *Waters* opinion, as follows (565 F. 2d at p. 1381):

> "We do not doubt that a policy favoring recall of a former employee with experience, even though white,

> before considering a new black applicant without experience comports with the requirements of Title VII . . . To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant. 502 F. 2d at 1320."

It may be true that in *Waters* the Seventh Circuit also held that Title VII had been violated when the employer restored the seniority rights of white employees who had waived their seniority in return for severance pay, thereby placing them ahead of Waters (a black bricklayer who had temporarily worked for the employer) on the seniority escalator for recall purposes. But this is hardly analogous to the treatment of the Globe-Wernicke employees at bar, who had neither waived nor lost their seniority following completion of the Globe-Wernicke project. In no sense did Avco accord "special seniority benefits" to the Globe-Wernicke employees, who stood at exactly the same place on the seniority escalator both before and after their training. As already emphasized, the later exercise of their seniority by the Globe-Wernicke employees in retaining their jobs on an interim basis ahead of less senior black aircraft workers was a protected application of Avco's bona fide seniority system. In any case, there was no real adverse impact visited upon the less senior black aircraft workers at the time of the force reduction, because all 52 of these black aircraft workers were subject to lay off within the next two or three weeks even if the Globe-Wernicke employees had never been trained and recalled.[7]

4. The suggestion that the Court of Appeals below departed from its proper fact-finding role, as prescribed in *Hazelwood School District* v. *United States,* 433 U.S. 299, 97 S. Ct. 2736 (1977), wholly misconceives the meaning of that decision. *Hazelwood* was brought to this Court

in the context of a District Court decision which had erroneously "focused on a comparison between the percentage of Negro teachers and Negro pupils in Hazelwood", with the result that it made no "evaluation of the relevant labor market". Footnote 20, 433 U.S. at p. 313, 97 S. Ct. at p. 2744. This Court's decision in *Hazelwood* announces the rule that the trial court must make the fundamental findings of fact which will support, in the first instance, the identification of the relevant labor market area for comparing hiring figures. That is all it stands for. Here, there was no attempt by the Court of Appeals to usurp the function of the District Court in making initial findings of fact necessary to any of the determinations of the lawfulness of the actions of Avco or the Union in the Globe-Wernicke incident. Indeed, as Petitioners themselves concede, the Court of Appeals below accepted in substance the District Court's findings of fact regarding the training and recall of the Globe-Wernicke employees. That the Court of Appeals viewed those findings of fact as insubstantial support for the District Court's ultimate determinations of law is no departure from the appellate role as bounded in *Hazelwood.*

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] This is reflected in Avco's Report to the Court, filed in the District Court on September 16, 1974.

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IN THE

Supreme Court of the United States

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No. 77-1522

RAMSEY ALEXANDER, *et al.*,
Petitioners,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AERO SPACE WORKERS, AFL-CIO, and AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION.

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REPLY BRIEF FOR PETITIONERS

The respondent employer,[1] but not the respondent union, asserts that the district court's finding as to the Globe-Wernicke incident was "an extraneous, non-determinative incident." In fact, however, the district court held the defendants conduct in connection with that incident was a violation of Title VII, Petition, p. 65a, and ordered additional proceedings to calculate the amount of back pay due to the victims of the Globe-Wernicke incident as well as other class members. Petition, p. 82a, n. 2. An evidentiary hearing regarding back pay for the Globe-Wernicke employees was being tried before the district judge in 1977 when the judge's finding of liability was overturned by the Sixth Circuit. In addition, the court of appeals, having concluded that the defendants' conduct in connection with

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[1] Brief for Respondent Avco, pp. 6-7.

Globe-Wernicke was legal regardless of their intent, not only reversed the district court's finding of a violation in that incident but also directed the district court to reevaluate its other findings of class wide discrimination because the sixth circuit thought them tainted by the district court's finding as to Globe-Wernicke. *Id.,* pp. 105a-106a. The sole reason why the Globe-Wernicke incident is not mentioned in the complaints is that the complaints were filed in 1966 and 1968, but the incident did not occur until 1971-72.

The district court in this action held that the defendants were racially motivated when they decided to provide special training for 73 whites who had worked at the Globe-Wernicke division. The respondents urge in opposition to certiorari, and the court of appeals held, that discriminatory intent is irrelevant under Title VII if the discriminatory policy depends for its success on the application of a bona fide seniority system.[2] Whether Avco's seniority system was in fact bona fide remains an open question. See Petition, p. 119a. But the violation which concerned the district court was not the application of the seniority system, but the intentional act of discrimination which preceded it. Respondents contention, and the decision below, that intentional discrimination is immunized from scrutiny where connected with a seniority system was rejected by this Court in *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976).

The respondents also deny that they engaged in intentional discrimination; Avco, for example, asserts it was "pure happenstance" that all the beneficiaries of the special training program were white.[3] The district court, however, found that the defendants were racially motivated, and the court of appeals did not question the accuracy of that factual finding. The trial court's findings could not be overturned unless they were clearly erroneous; respondents disagree with those findings, but do not and could not reasonably claim that the findings are without support in the record.

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[2] Brief for Respondent Avco, pp. 7-11; Brief for Respondent Aero Lodge, p. 5.

The respondent union,[4] but not the respondent employer, contends petitioners are not proper representatives of the subclass of blacks victimized by the Globe-Wernicke incident. The district court approved plaintiffs as representatives of a class of all "past, present and prospective black employees," Petition 14a, 113a, and the court of appeals upheld this certification. *Id.,* pp. 84a-91a. No opinion of this Court requires that in a Title VII action a class must be divided into subclasses, with separate representatives for each subclass, for each incident of intentional racial discrimination involved.

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[3] Brief for Respondent Avco, pp. 7, 10; Brief for Respondent Aero Lodge, p. 3.

[4] Brief for Respondent Aero Lodge, p. 6.

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the court of appeals for the Sixth Circuit.

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